

2016

**Build Inc., Plaintiff/Appellant, v. Utah Department of
Transportation, Clyde-Geneva Constructors, w.w. Clyde & Co., and
Geneva Rock Products, Inc., Defendants/Appellees.**

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

BUILD INC.,
Plaintiff/Appellant,
v.

UTAH DEPARTMENT OF TRANSPORTATION, CLYDE-GENEVA CONSTRUCTORS,
W.W. CLYDE & CO., AND GENEVA ROCK PRODUCTS, INC.,
Defendants/Appellees.

**BRIEF OF APPELLEES CLYDE-GENEVA CONSTRUCTORS,
W.W. CLYDE & CO., & GENEVA ROCK PRODUCTS, INC.**

On Interlocutory Appeal from the Third Judicial District Court, Salt Lake County,
Honorable Ryan M. Harris, District Court No. 090904101, Entered January 25, 2016

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STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to Utah Code Ann. § 78A-4-103(2)(j) and the Court's January 25, 2016 order.

STATEMENT OF THE ISSUE PRESENTED

Appellees Clyde-Geneva Constructors, W.W. Clyde & Co., and Geneva Rock Products, Inc. (collectively "Clyde-Geneva") are dissatisfied with the statement of the issues as presented by Appellant Build, Inc. ("Build"). Therefore, pursuant to Rule 24(b)(1) of the Utah Rules of Appellate Procedure, Clyde-Geneva presents the issues for review as follows:

Issue: A district court may dismiss an unmeritorious claim *sua sponte*. Build's consequential damages claim is unmeritorious because the district court properly excluded testimony from Build's sole witness who was to testify about used to prove the amount of its consequential damages. Did the court appropriately dismiss Build's claim for "consequential damages from concurrent conduct" because Build was unable to prove an essential element of its consequential damages claim?

Preservation: This issue was first raised on September 30, 2013 in UDOT's Motion for Partial Summary Judgement on Plaintiff Build, Inc.'s Consequential

Damages Claim at R. 750-775, 7160-7432, was raised again to Judge Harris on July 23, 2015 in UDOT's Motion and Combined Memorandum in Support of Motion in Limine to Exclude Testimony by Fred Stromness and Joan Whitacre Regarding Build's Value and/or Lost Profits as a Result of Build's Claim for Business Devastation at R. 10323-10343, 11104-11106 and was dealt with in oral arguments before Judge Harris on October 1, 2015 at R. 16292-293, 16299-304.

Standard of Review: A district court's authority to *sua sponte* dismiss a claim is reviewed for abuse of discretion. *See Blazef v. Cleveland Clinic Found.*, 2009 Ohio App. LEXIS 3231, 2008 WL 2932148. The propriety of the trial court's dismissal of Build's claim for failure to prove an essential element is reviewed for correctness. *Raab v. Utah Ry. Co.*, 2009 UT 61 ¶ 10, 221 P.3d 219.

STATEMENT OF THE CASE

I. NATURE OF THE CASE AND COURSE OF PROCEEDINGS.

Build's claims arise out of three separate construction projects known in this litigation as the Legacy Parkway Project, the I-215 Project, and the Arcadia Road Project. Build alleged in its Amended Complaint, under various legal theories, that it was entitled to additional payment for work performed on each of these projects, either from UDOT or from Clyde-Geneva, who acted as the

prime contractor on the Legacy Parkway Project. Build also claimed that because the projects occurred over the same general time frame, UDOT and Clyde-Geneva's failure to pay Build caused Build to go out of business, and as a result Build is entitled to "consequential damages from concurrent conduct." (Amended Complaint, pp. 8-10, R.178-180). Build claims that UDOT's acts on each of the three projects and Clyde-Geneva's acts on the Legacy Project had the combined effect of reducing Build's cash flow, reducing Build's bonding capacity, and ultimately forcing Build out of business. (*Id.*; Certificate of Service of Plaintiff's Initial Disclosures, R. 290-92; Exhibit A Plaintiff's Initial Disclosures, pp. 140-41)

On December 18, 2014, the district court, Judge John Paul Kennedy presiding, denied motions for summary judgment filed by all parties. (R. 9835-9841). Among the motions he denied in part was UDOT's Motion for Summary Judgment Re: Consequential Damages (which was joined by Clyde-Geneva), which argued in part that Build could not prove its claim for consequential damages because its expert witness failed to testify regarding the amount of consequential damages. *See Stevens-Henager College v. Eagle Gate College*, 2011 UT App. 37, ¶ 16, 248 P.3d 1025 (affirming summary judgment where the plaintiff did not disclose an expert to testify regarding damages).

On November 25, 2015, the district court, now with Judge Ryan M. Harris presiding and subsequent to oral argument, issued an Order ruling on several motions *in limine* filed by all parties. Build appeals from two portions of the Order, which dismissed its claims on the Arcadia Project and its claim for “consequential damages from concurrent conduct.” (R. 15777-86).

II. JUDGE KENNEDY’S RULING ON THE ARCADIA PROJECT CLAIMS.

Clyde-Geneva was not a party to the Arcadia Project. Build contracted directly with UDOT on the Arcadia Project. The claims relating to the Arcadia Project are therefore properly addressed by UDOT. Clyde-Geneva joins in UDOT’s arguments to the extent they support the dismissal of Build’s claim for consequential damages.

III. JUDGE KENNEDY’S RULING ON THE CONSEQUENTIAL DAMAGES FROM CONCURRENT CONDUCT CLAIM.

Build asserts that it sustained consequential damages as a result of Clyde-Geneva’s failure to make extra payments on the Legacy Project and UDOT’s failure to make extra payments on each of the three projects, Build was forced out of business. This claim is wrought with significant factual problems this

Court need not address on this appeal.¹ What is at issue here is whether Build should be allowed to maintain its claim despite having no evidence of the amount of its claimed consequential damages. Build failed to provide a computation of its claimed consequential damages in its initial disclosures and never supplemented its disclosures until after Judge Harris dismissed Build's consequential damage claim. Build's president, Fred Stromness, testified in his initial deposition (July 30, 2013 – July 31, 2013) that Build was relying entirely on the testimony of its expert accountant, Joan Whitacre, to establish its consequential damages claim. But Whitacre testified in her deposition that she had not calculated, and had no opinion regarding the amount of damages or on the value of Build's business at any time. Stromness then refused to answer questions about

¹ For example, Build bid the estimated length of driven pipe piles on the Legacy project at 96,186 lineal feet ("LF"). (R. 01112). The actual paid length of pipe piles was approx. 96,615.21 LF, for a net total increased pipe pile length of approx. 429.21 LF or 0.4%. (*Id.*) Build was paid by Clyde-Geneva and UDOT for every lineal foot of pile driven on the Legacy project at the agreed upon contract unit prices plus an additional \$130,000 for low headroom piles. (*Id.*) Build claims that even though on the Legacy project contract it made much more profit than its typical profit margin, its business was devastated such that it decided to close its doors several years later. Build's job cost records demonstrate that Build made a profit in the amount of \$704,047.00 – a 22.5% margin- more than its historical profit margin of 14%. (R. 011113). Build incredulously claims that it is entitled to have earned a profit margin of over 80%- approximately 600% more than its historical average. (*Id.*) This analysis doesn't even take into consideration the fact that approximately \$1 million of the \$2.5 million in Legacy project costs were mysteriously "allocated" to the job cost reports by Build management. (*Id.*)

Build's value in the continuation of his deposition.

Clyde-Geneva and UDOT moved for summary judgment on Build's consequential damage claim, arguing that Build could not prove its damages because it had provided no evidence of the value of its business at any time, and therefore no evidence of the amount of its loss. Judge Kennedy denied this motion, ruling that Build "presented evidence – most notably in the form of Joan Whitacre's expert opinion – that supports its consequential damages claim." (R. 9839). The ruling by Judge Kennedy was clearly erroneous since Whitacre's expert opinion did not provide any opinion as to the amount of claimed consequential damages.

IV. JUDGE HARRIS TAKES OVER THE CASE.

Shortly after Judge Kennedy denied Clyde-Geneva and UDOT's motions for summary judgment, he retired and Judge Harris took over the case. On April 29, 2015 Judge Harris held a scheduling conference where the parties requested a trial date. (R. 16070-116) At that hearing, counsel for both Appellees indicated that they intended to file "fairly weighty motions *in limine*" (R. 16078) which "if some of them are granted, it could dramatically reduce the number of issues that we have to actually try." (R. 16079). Consequently, the court set two separate

deadlines for motions—one for the motions that were potentially dispositive of claims, which would dramatically reduce the trial, and a second for additional motions *in limine* right before the trial. The court also reluctantly set a nine-week jury trial. Counsel for Build objected to the proposed first round of motions, noting that “we’re concerned that we’re going to see motions to rehash the motions for summary judgment and motions to strike,” (R. 16108) to which the court responded “Nothing you can do about that today....” *Id.*

V. JUDGE HARRIS’ RULING ON UDOT’S MOTION FOR CLARIFICATION REGARDING ARCADIA.

As previously stated, Clyde-Geneva was not a party to the Arcadia Project. That contract was between UDOT and Build. The claims relating to the Arcadia Project are therefore properly addressed by UDOT. Clyde-Geneva joins in UDOT’s arguments to the extent they support the dismissal of Build’s claim for consequential damages.

VI. JUDGE HARRIS’S DISMISSAL OF BUILD’S CONSEQUENTIAL DAMAGES CLAIM.

At the same time that UDOT filed its motion for Clarification Regarding Arcadia, it also filed a Motion *in Limine* to Exclude Testimony by Fred Stromness and Joan Whitacre Regarding Build’s Value and/or Lost Profits as a Result of

Build's Claim for Business Devastation which Clyde-Geneva joined. (R. 10323-10343, 11104-1106) Clyde-Geneva and UDOT argued that neither Stromness nor Whitacre should be allowed to testify regarding the amount of Build's consequential damages. (*Id.*)

Clyde-Geneva and UDOT further argued that the testimony of Build's retained expert Whitacre should be limited because her report contained no opinion of the amount of Build's damage. (*Id.*) Build conceded this point, despite the fact that Judge Kennedy's previous denial of summary judgment turned on Whitacre's testimony. (R. 16246, 16273-74). The district court precluded Whitacre from testifying as to the amount of Build's consequential damages. (R. 15781-83)

The reasons to exclude Stromness's testimony are slightly more complicated. While there is Utah law that a knowledgeable business owner may testify as to the value of his or her business, Clyde-Geneva and UDOT argued that Stromness should not be allowed to give such testimony. First, in his second deposition, Stromness admitted that he did not have the knowledge or expertise to answer questions regarding Build's value (Exhibit B, Stromness Deposition August 5, 2014, p 73). Second, in his second deposition Stromness refused to

answer any questions regarding the valuation of Build. (*Id.* at 73-76). Third, Build failed to disclose at any time during fact and expert discovery any computation of its consequential damages, and in fact precluded Clyde-Geneva and UDOT from obtaining such a computation.²

The following timeline demonstrates the progression of discovery regarding the amount of Build's consequential damages claim:

- August 17, 2012—Build serves its initial disclosures. Those disclosures indicate that Fred Stromness had “direct personal knowledg [sic] of and understanding of . . . the business devastation claim of Build. (Exhibit A, Build Initial Disclosures p. 76-77). Build also provides the following statement regarding its calculation of damages for its business devastation claim:

Build suffered business devastation damages, including but not limited to loss of future business opportunities, cash flow, and bonding and borrowing capacity. These damages were a foreseeable consequence of UDOT's failure to pay amounts due and owing to Build on each of the projects; and/or they were a direct and proximate result of UDOT's failure to pay amounts which UDOT knew, should have known, and/or acknowledged were due and owing to Build on each of the Projects. Such damages were also a foreseeable conse-

² Judge Harris stated during the October 1, 2015 oral arguments, “It’s been admitted today that that was never supplemented and upon questioning from the Court, the plaintiffs, as they stand here today in October, after two full rounds of summary judgment briefing and motion *in limine* briefing, after pre-trial conferences that set trial dates, after expert depositions, after all the things that you all have done, it’s astounding to me, frankly, that the plaintiffs stand here before me and are unable to articulate what their damages figure is. I—I just shake my head. The violations of Rule 26(a)(1)(C) are—are evident. These were compounded by violations of Rule 30(c)(2) at the deposition.” (R. 16301).

quence of UDOT's failure to participate in the Dispute Resolution Board process in good faith and of UDOT's breach of the partnering agreement with Build; and/or they were a direct and proximate result of UDOT demanding that Build engage in the Dispute Resolution Board process, in which UDOT never intended to participate in good faith and failed to participate in good faith. Such damages were also a foreseeable consequence of UDOT's breaches of its contracts and relationships with Build; or they were a direct and proximate result of UDOT's intentional, unreasonable, unconscionable, and willful deviation from reasonable standards of conduct, by which UDOT set out to, and furthered actions which were intended to, devastate Build's business, foreclose future business opportunities, and deprive Build of the cash flow required to sustain Build's business; or they were both. **The amount of such business devastation is being calculated, but is not yet complete.** This initial disclosure will be timely supplemented upon completion of such calculation. Upon information and belief, Build asserts that this damage figure will exceed the sum of \$5,000,000.00.

(*Id.* p. 140-141, emphasis added). At the time of its Initial Disclosures, Build also produced approximately 57,000 pages of documents allegedly supporting its claims. It has since produced nearly 500,000 pages during discovery.

- April 2, 2013— Build submitted the expert report of Joan Whitacre, which includes no computation for consequential damages.
- July 30, 2013— UDOT took the deposition of Fred Stromness. Due to time restraints, Clyde-Geneva did not have an opportunity to ask any questions of Mr. Stromness. Build's counsel agreed to allow Clyde-Geneva to depose Mr. Stromness on a mutually agreeable date in the future. (R. 16274). Regarding Build's damages claims, in this deposition Stromness testified as follows:

Q: And the business devastation claim, is that based upon Joan Whittaker's [sic] report?

A: It is. (Exhibit C, Stromness Depo, vol. 2 pp. 83-84)(emphasis added).

- July 31, 2013—Fact discovery closes.
- August 20, 2013—Clyde-Geneva and UDOT take the deposition of Joan Whitacre. Ms. Whitacre testified in pertinent part as follows:

Q: And is your report suggesting that Build has been damaged in the amount of \$15.4 million as a result of the nonpayment of the amounts they're claiming in this lawsuit?

A: There wasn't anywhere in my report where I computed damages.

Q: So your computation of that amount is not intended by you to be a representation of a damage amount?

A: It is not. (Exhibit D, Whitacre Deposition, p. 84).

Q: Are you offering an expert opinion at all as to the value of Build at any point in time?

A: I am not. (*Id.* p. 90).

Q: And I think you testified today, you're not expressing any expert opinion in this matter about the valuation of Build over any period of time either?

A: I am not.

Q: And you're not – you've never been asked to testify about any claim for business devastation?

A: I have not.

Q: You're not expressing any expert opinion about any business devastation claim?

A: I am not. (*Id.* pp. 119-120).

- September 30, 2013— UDOT filed its Motion for Partial Summary Judgment on Build's Consequential Damages Claim. (R. 750-775). Clyde-Geneva joined in that motion.
- December 12, 2013— Build filed its opposition to the Motion for Partial Summary Judgment on Build's Consequential Damages Claim, which included a Declaration of Freddie Stromness. (R. 3577-600; 3636-43). In that declaration, as filed, Stromness states in the last paragraph that "Build's economic enterprise value as of Dec. 31, 2006, falls in the range of \$15MM to \$15.5MM." (R. 3642). The declaration contained no other statement regarding Build's value at any point.³
- August 5, 2014— As agreed, Fred Stromness was deposed by counsel for Clyde-Geneva. During the deposition, Stromness testified as follows:

Q: ...My understanding is you have got an expert who has gone through to try and analyze the business devastation claim. Is that right?

³ Build has since claimed that it inadvertently failed to file a second declaration on December 13, 2013 where Stromness stated Build's present value at \$140,000, and that the signature pages of the two declarations were also switched by mistake. Clyde-Geneva and UDOT do not dispute that Build's error was inadvertent. However, Clyde-Geneva and UDOT did not receive the second declaration until August 25, 2015—long after all discovery on this case was completed, and long after any party had any opportunity to question Stromness on his opinions. Mr. Stromness' testimony in his second deposition contradicts his declarations because he testified that he was unqualified to answer questions regarding calculation of Build's business devastation damages.

A: I am aware that Ms. Whitaker [sic] has undertaken that task.

Q: You haven't undertaken the task to go through the books and records of Build, Inc. to try to analyze or come up with a damage calculation for any business devastation claim?

MR. TROUT: I'm going to object to the form of that question.

STROMNESS: My knowledge, my education, my experience does not give me the understanding. My experience does not give me the understanding I perceive I need to answer your question, sir.

I know that Ms. Whitaker [sic] undertook to create – undertook to create a report, but its depth, its breadth –
...

Q: Have you done any analysis of the books and records of Build, Inc. to make a determination as to what damages Build, Inc. sustained by reason of the business devastation?

MR. TROUT: I'm going to object to the form and instruct the witness not to answer. You are now moving into an area that's post the deposition that was conducted by UDOT, which Mr. Wilson attended. And I'm going to instruct him not to answer.
...

Q: Are you going to testify at trial as to any damages sustained by Build, Inc. by reason of the business devastation?

MR. TROUT: I'm going to instruct the witness not to answer that question. That's a strategic decision between he and his attorney in this matter. It's privileged. He is instructed not to answer.

Q: As of this date, Mr. Stromness, have you made any analysis of any quantification of any damages sustained by Build, Inc. by reason of what you claim to be a business devastation by Clyde-Geneva?

MR. TROUT: Object. Same instruction. You are not allowed to answer that question.

...

Q: What amount of damages is Build seeking for business devastation against Clyde-Geneva and UDOT in this proceeding?

MR. TROUT: Object to the form of the question. It's been asked and answered. The witness is instructed not to answer. (Exhibit B, Stromness Deposition, August 5, 2014, pp. 72-75, 108-109).⁴

- December 18, 2014— Judge Kennedy issued an Order in which he denied Clyde-Geneva and UDOT's Motion for Partial Summary Judgment on consequential damages, finding that Build had presented evidence "most notably in the form of Joan Whitacre's expert opinion" that created an issue of material fact that precluded summary judgment. (See December 18, 2014 Order, R. 9835-9841).

⁴ In direct response to Build's counsel directing Mr. Stromness not to answer questions regarding Build's business devastation claim, Judge Harris succinctly noted in the October 1, 2015 oral arguments: "...not only did the defendants not have a copy of the declarations and certainly were all willing to forgive people's clerical errors, but the fact is, the defendants did not have copies of these declarations and wanted to inquire, I think quite fairly, of Mr. Stromness about his damages theories and computations with regard to this claim that's the big claim. And they endeavored to ask about it at the second deposition in August, 2014, and Mr. Trout refused to allow that, he refused to allow any questioning about the damages calculation...when the defense attempts to ask about the particulars of whatever damages computation might be out there, they're actively thwarted at the deposition when they attempt to ask about that." (R. 15613-14).

- August 28, 2015 — Counsel for Clyde-Geneva and UDOT first received the Declaration of Freddie Stromness Regarding Build, Inc.'s Value, in which Stromness sets out his method for calculating Build's value at \$15MM-\$15.5MM on December 31, 2006. (R. 13016-27). The same day, Clyde-Geneva and UDOT also received, for the first time, which Build claims is the correct last page of a Stromness's declaration regarding consequential damages, which states that Build's, post-liquidation value is \$140,000. (R. 12978-13015).

At the hearing of this Motion held October 1, 2015 (after more than three years of litigation), the district court centered its analysis and questioning on Build's failure to ever provide a computation of its consequential damages. The district court pointedly asked Build's counsel:

The Court: What is your computation? You know, we're way past all discovery deadlines, I think it's fair for these guys to ask and it's – and I'm asking you now: What's your damages computation? What number are you going to have somebody give to the jury that they should award you on this business devastation claim?

Mr. Fetzer: It's going to be based on that \$50 million (sic) evaluation and \$140,000 years later, in other words, the business has been devastated, the value of that business is gone. Somewhere in between –

The Court: . . . What is the number?

Mr. Fetzer: I don't have that number as I stand here today. . . . Have we disclosed that number? And the answer is no.

(R. 16272-73). When pressed, Build admitted further that Fred Stromness would be Build's sole witness to testify as to the amount of damages sustained, despite

having prevented any questioning on that topic at his deposition. (R. 16273-74, 16292).

Noting the alternative option of essentially beginning the case over again⁵, the district court granted Clyde-Geneva and UDOT's motion, and excluded testimony by Whitacre and Stromness regarding the amount of consequential damages. The court then ruled "Mr. Stromness will not be able to talk about things that he hasn't already talked about. And because he hasn't already talked about the damages computation and because we don't have an amount, even as we sit here today, I think the effect of that is – is that the dama – the business devastation claim will end up failing for lack of proof. (R. 16304). The court's written order reflected that conclusion, and dismissed the consequential damages claim for lack of proof.

STATEMENT OF THE FACTS

I. LEGACY PROJECT BACKGROUND.

UDOT issued a notice of award to Clyde on November 14, 2006. (R. 11111).

⁵ Judge Harris noted in October 1, 2015 oral arguments, "...we have five months or so before trial, could – could we somehow try to put the genie back in the bottle, try to – try to set some sort of new discovery deadlines, deadlines for pre-trial dis – or for initial disclosure obligations, which again, you shouldn't be setting right before trial, deadlines for a deposition that was thwarted, deadlines for new experts and potentially new expert depositions...given the amount of work that's going to be involved going forward...to re-open discovery for all of these purposes." (R. 16302-03).

The notice to proceed was issued on November 22, 2006. (*Id.*) Clyde entered into a prime contract dated November 20, 2006, with UDOT for the Legacy project that included the construction of eight (8) bridges. (*Id.*) The original approximate sum of the prime contract was \$99,681,923.87. (*Id.*) Clyde entered into a subcontract with Build on January 23, 2007. (*Id.*) Build's scope of work included driving 1,076 pipe piles (which pipe materials were furnished by UDOT) at nine different structures, sheet pile walls at 39 locations for the bridge structures, and temporary sheet pile pursuant to UDOT plans and specifications. (*Id.*) The original subcontract amount for Build's scope of work on the Project was \$2,207,836.00 (\$1,563,326 for the installation of the owner-supplied pipe piles; \$644,510 for sheet piles). (*Id.*) It is significant to note that the scope of pipe pile work to be performed by Build on the Legacy project comprised only 1.5% of the entire Prime Contract scope of work. (*Id.*)

There were some minor variations in the plan depth to which some piles were estimated to be driven versus the actual depth to which a few of the piles were driven. (R. 11112). A few were driven deeper than the estimated depth and some were not driven as deep as had been estimated. (*Id.*) Such variations were anticipated. (*Id.*) Because of the anticipated variations of depth, pile driving is

traditionally, and on the Legacy project specifically, paid on the basis of a unit price per lineal foot actually driven. (*Id.*) Ultimately, the estimated bid length of driven pipe piles that was bid upon by Build was approx. 96,186 lineal feet ("LF"). (*Id.*) The final paid length of pipe piles was approx. 96,615.21 LF, for a net total increased pipe pile length of approx. 429.21 LF or 0.4%. (*Id.*)

Build was paid for every foot of pile driven on the Legacy project at the agreed upon contract unit prices. (*Id.*) In addition, Build was paid an additional \$130,000.00 for alleged increased costs in driving the low headroom piles on the Project. (*Id.*) Build claims that it performed extra work and is therefore entitled to be paid an additional \$1.4 million plus consequential damages. (R. 11113).

Build's claimed costs are unsupported by and inconsistent with Build's job cost records. (*Id.*) Build's job cost records demonstrate that Build did not suffer a loss on the Legacy project. (*Id.*) Rather, Build's job cost records show that Build made a profit of \$704,047.00 on the Project – a 22.5% profit margin. (*Id.*)

In fact, Build likely made substantially more profit on the Legacy project than is currently shown in its job cost records because about \$1 million of the \$2.5 million in Build's Legacy project job costs were "allocated" to the job cost reports

by Build management (whose initials are FS)⁶ as something called a D&R allocation. (*Id.*) The historical job cost records from Build shows that it typically made anywhere from 10-15% profit margin on all its construction jobs. (*Id.*) However, on the Legacy project Build has already made a 22.5% margin (even with \$1 million of Build's costs mysteriously "allocated" to the Project). (*Id.*) If Build was awarded its pending claim of \$1.4 million, Build would earn an astounding profit margin of 87%. (*Id.*)

The fact that Build's underlying claim for lost profits on the Legacy project is unsupported and inconsistent highlights exactly why Build's unmeritorious consequential damages claim was dismissed by the district court. Build cannot prove any essential element of its damage claims.

II. CONSEQUENTIAL DAMAGES.

The thrust of Build's claim is that it began work on the three UDOT projects around the same time and that UDOT failed to pay Build for extra work and changed conditions on each of the projects (and Clyde-Geneva failed to pay Build on the Legacy project). (R. 171-80). As a result, the amount that Build claims is estimated to exceed \$5 million. (Exhibit A, 141). Build claims it was

⁶ When Fred Stromness, the President and Treasurer of Build, was questioned about who "FS" was he testified he "did not know." (Exhibit B, pg 10).

ultimately forced out of business in 2012, some three years after completion of the last project.

However, Build's consequential damages claim is suspect, and it is easy to see why Build has been unable to adequately support the claim. In March 2010, after the three projects at issue were completed, Build hired Kevin Nilsen to replace Mr. Stromness as president and CEO of Build. Mr. Nilsen testified that when he reviewed Build's business records he found that "there was quite a bit of cash flow" or "pretty healthy" cash flow from 2007-2009, the exact time period during which Build performed on the subject projects. (R. 7172, 10534).

While Build claims that UDOT reduced the amount of work that Build could do as a result of diminished bonding capacity, just the opposite occurred. From 2009 to 2010, UDOT actually increased Build's "prequalified" capacity to work as a direct contractor on UDOT projects by nearly 50% from \$20,125,000.00 to \$30,175,000.00. (R. 7173). This increase lasted through July 1, 2011, long after the completion of the three projects. (*Id.*; 7229-34).

Stromness also admitted that Build faced challenges for a number of years pre-dating 2007 that led him to put the business up for sale. (R.7173). In fact, he

had been looking for a potential buyer willing to make a "realistic offer" since approximately 2000. (*Id.*; 7311-7312)

In the summer of 2007, prior to the starting of the first of the three projects that are the subject of this lawsuit, Mr. Stromness candidly stated in an email that he did "not quite have the mental fortitude needed to operate and manage Build in the new construction market as it exist." (R. 7174, 7316).

Eventually, Build hired Kevin Nielsen to replace Stromness as its CEO. Kevin Nilsen, who was hired to "turn around" Build in March 2010, testified as to what he discovered when he took over for Mr. Stromness as president and CEO of Build. (R. 7176, 10329). He identified multiple adverse financial and business challenges that Build experienced, both pre-dating his involvement with Build and during his employment, all of which were unrelated to and independent of any alleged failure of Clyde-Geneva and UDOT to pay monies "due and owing" to Build, including:

1. Mr. Stromness "having a difficult time making decisions with regard to day-to-day operational decisions" as of at least November 2009. (*Id.*; R. 10525-29)
2. Build's excessive legal and accounting fees. (R. 10329, Exhibit E, Nilsen Depo., at 25)
3. Build's failure to settle "the UDOT issue" in order to "stop the

bleeding". (R. 10329; 10537)

4. Stromness's failure to communicate litigation settlement offers to Build's CEO, despite Mr. Nilsen's recommendation that the suit be settled and Mr. Nilsen's expectation that all settlement offers would be presented to him as Build's CEO and president. (R. 10329-30, 10552-54, 10559-62)
5. Build's inability to make profits while working as a general contractor on actual "bridge construction projects", in contrast to providing subcontract pile or foundation work, beginning in at least 2007. (R. 10330, 105030, 105035-36)
6. Build continuing to provide general contractor services on existing and new bridge building projects after 2010 without a demonstrated ability to "maintain steady profitability". (R. 10330, 10534-36)
7. Excessive overhead for company executives, including Mr. Stromness's mother on the payroll. (R. 10330, 10531, 10546-47)
8. Failure to require outside vendors to submit to competitive bidding requirements. (R. 10330, 10531)
9. Failure to consider changing Build to an ESOP (Employee Stock Ownership Plan). (R. 10330, 10531-32)
10. The decision of Build's Board of Directors to cease operations, even though Nilsen repeatedly advised the Board that the business could be "turned around". (R. 10330, 10533)
11. Build's failure to continue "turn around" efforts that had resulted in dramatic overhead reductions, streamlined operations, and an increased focus on tank and pile work "which were proving profitable". (*Id.*)

12. Build's employment of incompetent or excess shop managers, bookkeepers, project managers, and project superintendents. (R. 10330, 10538-39)
13. Variable surety bonding market cycles beginning in 2010 which became increasing "hard" with increasing bond and premium rates and decreased bond availability. (R. 10330, 10540-41)
14. CNA Surety's decision in March or April 2011 to not provide further surety credit to Build, except on a project by project basis. (R. 10331, 10542)
15. Outside accounting firm overcharging and failing to provide timely information. (R. 10331, 10543)
16. Stromness's passion for the present litigation getting "in the way of day- to-day decisions". (R. 10331, 10554-55)
17. Stromness's inability or failure to allow the new CEO from making and implementing proper employment hiring/firing decisions due to "loyalty" issues to long term employees. (R. 10331, 10544; Exhibit E, Nilsen Depo., at 47, 130-136.)
18. Excessive employee salaries. (R. 10331, 10545-46)
19. Build's retention of approximately \$500,000 in excess and unused equipment until 2011. (R. 10331, 10547-48)
20. Build's decision to incur excessive debt of \$800,000-\$900,000. (R10331, 10548-47)
21. Build's failure to follow accepted accounting practices, including in the proper accounting for project overhead. (R. 10331, 10556-10558)
22. Failure to procure a letter of credit from Wells Fargo Bank in

August 2010 as a condition for further bonds being issued by CNA Surety. (R. 10331, 10562-10563)

23. Wells Fargo Bank's decision in early 2009 not to renew Build's line of credit. (R. 10331, 10564-10565)
24. Downturn in general economy and specifically in the construction industry, with money "getting tighter" and fewer projects being placed out for bid. (R. 10331, 10566)
25. Build's competitors being willing to bid on the few available projects on a less profitable "buy the job" basis just in order to keep their employees busy and on the payroll. (*Id.*)
26. An increased number of competitors in Build's field of work. (R. 10332, 10566-67)
27. Build receiving an unfavorable agreement for a line of credit with Prime Alliance. (R. 10332, 10568-69)
28. Far West Bank withdrawing a line of credit. (R. 10332, 10571)
29. Build employees "milking" projects with excessive overtime without proper management controls and oversight. (R. 10332, 10572)
30. State and local governmental agencies withdrawing projects scheduled to be bid upon and others extending contracts to competitors based upon negotiated rates. (R. 10332, 10573)
31. Federal government putting projects and federal funds on hold. (R. 10332, 10574)
32. Employees bidding on jobs, including large bridge projects, without authority and proper bidding experience. (R. 10332, 10577)

33. The years of 2009, 2010 & 2011 were all unprofitable years for Build. (Exhibit E, Nilsen Depo., at 177:3-5).
34. In 2010, Build lost \$1.4 million dollars on a Wyoming DOT project, another loss of \$200,000-\$250,000 on an Idaho DOT project (Lorenzo bridge) and another loss of \$600,000 on another Idaho DOT project (Menan Bridge). (R. 10579-80).
35. During the 2010-2012 timeframe, jobs were underbid, over expensed and totally mismanaged by Build. (R. 10579).
36. The losses suffered by Build in 2010 on projects were carrying over into 2011 and 2012, creating the problem with Build's business continuing. (Exhibit E, Nilsen Depo., at 169:6-14).
37. The Stromness family had taken money out of Build to finance outside projects to develop and build post offices as a primary source of income for the Stromness family entities. (Exhibit E, Nilsen Depo., at 182:25 to 183:12).
38. Build turning down a favorable line of credit of \$1,000,000 to \$3,500,000 from the Bank of American Fork in anticipation of obtaining an even more favorable anticipated \$2,000,000 line of credit from Zion's Bank. (R. 10332, 10569-70)
39. Zion's Bank's "out of left field" failure to live up to verbal commitment to extend a line of credit. (R. 10332, 10570)
40. The refusal of the Bank of American Fork to renew its expired commitment to a line of credit after Build "was left standing at the altar" by Zion's Bank. (R. 10332, 10575-76)
41. Fraud and defalcation of company checks by a project superintendent, including payment of kick-backs by suppliers. (R. 10333, 10581-82)

42. Unanticipated tax and insurance audits that resulted in costs of approximately \$120,000. (R. 10333, 10586)
43. Build's employee health insurance program through 2009 which resulted in additional expenses of approximately \$105,000 annually. (R. 10333, 10587)
44. Build's failure to negotiate a commercially competitive rent for office and yard space, resulting in excess expenses of approximately \$60,000 annually. (*Id.*)
45. Excessive use of business consultants, resulting in excess expenses of approximately \$75,000 annually. (*Id.*)
46. The unwillingness of Mr. Stromness or the Stromness family and related businesses to further capitalize Build to permit Mr. Nilsen's turnaround efforts to continue. (R. 10333, 10583).

There were many more factors, totally extraneous to the actions or inactions of Clyde-Geneva and UDOT, which could be pointed to as adversely impacting the financial standing of Build between 2007 and 2010 which led Build's Board to eventually elect to close down Build's operations. (R. 7180). However, Mr. Nilsen made clear in an August 26, 2010 email the single biggest factor driving Build's struggles, stating "the economy is the single biggest factor [sic] today. This recession is the worst that I have seen in my 35 years in the business." (*Id.*; 7361-63).

Considering all of the factors weighing into Build's demise, Build should have disclosed a detailed, precise calculation of the amount of its loss attributable to Clyde-Geneva and UDOT. (R.15781-82). But it produced nothing; consequential damages were still being computed. (*Id.*) Build never supplemented its initial disclosures to identify the amount of its claimed consequential damages. Build's expert never testified as to the amount of its claimed consequential damages, and its owner, Fred Stromness, was directed by counsel not to answer questions about the amount of any claimed consequential damages. (*Id.*) In short, as the parties were preparing for a nine-week trial and well after discovery had ended, the parties were still unaware of the amount of damages Build would seek at trial. Build's attorney did not even know the amount of consequential damages that Build was going to be seeking as late as October 1, 2015, the date of oral argument on the pretrial motions. (R. 16270-73, 78, 92-93, 299-304).

SUMMARY OF THE ARGUMENT

The district court correctly dismissed Build's claim for consequential damages. The law of the case doctrine does not apply to this case, and Judge Harris had discretion to revisit any previous rulings at the request of the parties or on his own accord. Also, Build asserts for the first time on appeal a claim for

attorney's fees under a third-party tort rule theory as a component of its consequential damages. This argument is raised for the first time on appeal and the Court need not address it because Build failed to preserve this claim for appeal. Accordingly, this Court should affirm the district court's order.

ARGUMENT

The district court correctly dismissed Build's claim for consequential damages. Build now argues that the decision should be reversed simply because the district court's procedure is not to Build's liking. Build's incorrectly assumes that a district court judge's hands are tied unless a party has filed a particular motion. Because the law provides the district court the discretion to make the rulings it did, and because the substance of those rulings are correct, this Court should affirm the district court's order.

I. THE DISTRICT COURT CORRECTLY DISMISSED BUILD'S CLAIM FOR CONSEQUENTIAL DAMAGES.

a. The District Court Has the Authority to Review the Motion for Clarification as a Motion to Reconsider.

The District Court properly took Clyde-Geneva's and UDOT's Motion for Clarification as a motion to reconsider Judge Kennedy's denial of summary judgment. As Build points out in its brief, "the substance, not caption, of a

motion is dispositive in determining the character of the motion.” *Trembly v. Mrs. Fileds Cookies*, 884 P.2d 1306, 1310 n. 2 (Utah Ct. App. 1994); *Kunzler v. O’Dell*, 855 P.2d 270, 273. While it is true that Clyde-Geneva and UDOT originally presented the Motion as a request for the Court to clarify its prior ruling, and to make rulings on what it viewed as unresolved issues, including “whether Build’s Arcadia Project Claims are barred by Build’s failure to comply with the notice of claim provisions of the contract,” Build argued, and the district court accepted, that Clyde-Geneva and UDOT were in fact requesting that the court reconsider the prior ruling. Build argued at length in its opposition memorandum that the district court would violate the coordinate judge rule if it reconsidered Judge Kennedy’s prior ruling. Clyde-Geneva and UDOT responded to that argument on reply.

At the hearing, Build made an oral motion to dismiss Clyde-Geneva and UDOT’s “motions with respect to Arcadia and Legacy on the grounds that we’ve not had an opportunity to address them as Rule 54 and Rule 56 motions, respectively.” (R. 16121). The district court denied Build’s motion, stating that it was “skeptical” that Build had not had an opportunity to address Appellees motions as requests for the court to reconsider “since [Build] spent significant time

accusing them of just that.” (R. 16128). The court then stated, in the context of both the Legacy and Arcadia motions that it recognized that Clyde-Geneva and UDOT were asking it to reconsider Judge Kennedy’s prior rulings, and ruled that it would consider those arguments and reconsider prior rulings where appropriate. (R. 16143). Later in the hearing, the district court’s ruling on the Arcadia Motion further demonstrates that the court was reconsidering Judge Kennedy’s prior ruling. The court stated “I’m given a little bit of pause by [the] argument that Judge Kennedy heard all of this I’m mindful of that, but I don’t understand how – how he distinguished *Meadow Valley*.” (R. 16387).

Build now argues that Clyde-Geneva’s and UDOT’s Motion was an untimely motion for summary judgment simply because Clyde-Geneva and UDOT initially sought clarification, rather than reconsideration of Judge Kennedy’s order, and the district court’s written order expressly stated that it considered the Legacy Motion to be a motion to reconsider, but it was silent as to the Arcadia Motion. This argument ignores the entire context of the district court’s ruling from the bench that it would reconsider issues previously decided by Judge Kennedy—including issues on both Arcadia and Legacy. Judge Harris correctly determined the nature of Clyde-Geneva’s and UDOT’s Motion from its content—

not from its caption.

Moreover, the Supreme Court has held that a district court can reconsider prior rulings *sua sponte* under Rule 54(b). *IHC Health Services, Inc. v. D&K Management, Inc.* 2008 UT 73, ¶27, 196 P.3d 588. Accordingly, even if Clyde-Geneva and UDOT brought a different motion—or no motion at all—Judge Harris was free to rule on the district court’s prior decision while the case was pending before him. He properly exercised his discretion to do so.

b. Judge Harris Acted Within His Discretion When He Reconsidered Judge Kennedy’s Prior Ruling.

Build next argues that, although it is unquestionable that the district court would have discretion to reconsider its prior rulings so long as the same judge is assigned to the case, *see IHC Health Services*, 2008 UT 73 at ¶ 27, it loses that discretion when the case is transferred from one judge to another based on the “coordinate judge rule.” *See* Aplt. Br. p. 25. This argument fails for three reasons. First, while several Utah cases have recognized that, except in certain circumstances, one district judge cannot overrule another district court judge of equal authority, many other Utah cases demonstrate that, as to interlocutory orders, a trial court is free to reconsider its prior rulings regardless of a change in judge. *See Mid-America Pipeline Co. v. Four-Four, Inc.*, 2009 UT 43, ¶ 11 216 P.3d

352. This position is in keeping with Utah Rules of Civil Procedure Rule 54 and should be upheld. Second, when the law of the case doctrine does not apply, a judge is free to revisit prior rulings at the request of the parties or *sua sponte*. *IHC Health Servs. v. D & K Mgmt.*, 2008 UT 36, ¶ 27. Third, if the coordinate judge rule applies, the district court's order properly falls under the exception allowing reconsideration when "it appears to the second judge that the first ruling was clearly erroneous and will infect the subsequent proceedings with error." *Red Flame v. Martinez*, 2000 UT 22, ¶¶ 4-5, 996 P.2d 540. For any of these three reasons, the Court should deny Build's request to reverse Judge Harris' dismissal of Build's claims.

i. *A District Court May Reconsider Interlocutory Orders, Regardless of Whether There has been a Reassignment.*

In *Mid-America Pipeline Co. v. Four-Four, Inc.*, 2009 UT 43, 216 P.3d 352, the Utah Supreme Court rejected Build's very argument that Judge Harris erred in reversing Judge Kennedy's previous ruling. In that case, the parties had entered into a settlement of most of their claims, and agreed that remaining claims would be pursued in a particular fashion, and that they would agree on the language of an amended complaint to be filed to address the claims. *Id.* at ¶ 4. The parties were ultimately unable to reach an agreement as to the language of the amended

complaint, and *Mid-America* filed an action to enforce the parties' agreement, and to allow it to file a complaint with the language it proposed. Judge Henroid agreed and allowed *Mid-America* to file its amended complaint. *Id.* at ¶ 7. *Mid-America* filed a similar, but not identical complaint, and *Four-Four* moved to strike it. *Id.* at ¶ 8. The case was reassigned to Judge Faust, who interpreted the parties' agreement differently, and reversed Judge Henroid's prior order, finding that the version of the complaint proposed by *Four-Four* was consistent with the parties' agreement, not the version proposed by *Mid-America*. *Id.* at

On appeal, *Mid-America* argued that Judge Faust violated the "law of the case" by overruling Judge Henroid's prior ruling. The court rejected this argument, concluding:

Mid-America inverts the law by suggesting that law of the case doctrine prevents a district court from reconsidering a resolved issue. Law of the case does not prohibit a district court judge from revisiting a previously decided issue during the course of a case, *regardless of whether the judge has changed or remained the same throughout the proceedings*. Rather, 'the doctrine *allows* a court to decline to revisit issues within the same case once the court has ruled on them.' *IHC Health Servs., Inc. v. D&K Mgmt.*, 2008 UT 36 ¶ 26 (emphasis added).

The Supreme Court again made clear in *McLaughlin v. Schenk* that a district court had the discretion to reconsider its prior rulings—even when the case is

reassigned—regardless of whether the criteria of the coordinate judge rule are met. 2013 UT 20, ¶22, 299 P.3d 1139. The court held,

There are exceptions to the law of the case. In these situations, a judge is *required* to reassess a prior ruling. These situations are ‘(1) when there has been an intervening change of authority; (2) when new evidence has become available; or (3) when the court is convinced that its prior decision was clearly erroneous and would work a manifest injustice.’ *Mid-Am. Pipeline*, 2009 UT 43 at ¶ 14.

2013 UT 20 at ¶ 24 (emphasis added). *Mclaughlin* makes clear that a district court has the discretion to reconsider prior interlocutory orders, but reconsideration is mandatory if any of these criteria are met. The district court is not, as Build suggests, prohibited from reviewing interlocutory orders *unless* the criteria are met.

Build points to the Supreme Court’s recent decision in *USA Power* as a confirmation that Utah follows its interpretation of the coordinate judge rule—opposite of that articulated in *Mclaughlin*. But *USA Power* is a far different case. *USA Power* was twice heard by the Supreme Court on appeal. 2016 UT 20, ¶ 25. In the first appeal, the Supreme Court reversed the trial court’s grant of summary judgment to defendants. *Id.* The case then went to trial, the jury found in plaintiffs’ favor, and the trial court granted a judgment notwithstanding the verdict in defendants’ favor, which was then appealed. *Id.* ¶¶ 25-27. With respect to the

discussion on the law of the case, the Supreme Court's analysis was focused on whether its decision in the first appeal was controlling as to the same issues in the second appeal. *Id.* ¶ 36. It adopted, for purposes of interpreting rulings on factual matters by *appellate* courts, the coordinate judge rule, and then concluded that the "different light" exception to the rule applies when a court hears the same issue after evidence has been presented at trial. *Id.* ¶ 38. It did not adopt the coordinate judge rule with respect to a district court's interlocutory orders, and it did not overrule *Mid-America*, *McLaughlin*, or any of the other cases confirming a district court's discretion to reconsider its own interlocutory orders.

- ii. ***Since the Law of the Case Doctrine does not Apply to a Case, Judge Harris had Complete Discretion to Reconsider and Overturn Previous Rulings of Judge Kennedy even if Judge Harris Inherited the Case.***

The law of the case doctrine applies to decisions on appeal and on remand, and not to cases that are currently before the district court prior to an appeal. *See McLaughlin v. Schenk*, 2013 UT 20, ¶ 21, 299 P.3d 1139, 1144; *See also Blackmore v. L&D Dev. Inc.*, 2016 UT App 130, ¶ 31 (holding that the district court judge was well within his discretion in setting aside the previous judge's ruling on a motion for summary judgment). "While there are exceptions to the doctrine of law of the case, these exceptions function only to dictate when the district court has no discretion

but rather must reconsider a previously decided, unappealed issue.” IHC Health Servs. v. D & K Mgmt., 2008 UT 36, ¶ 33 (emphasis added)(holding that the district court judge did not abuse his discretion by declining to revisit an issue he had previously ruled on while the case was not on appeal, and therefore not subject to the law of the case doctrine). In addition to the ruling in *IHC Health Servs*, *McLaughlin* and *Blackmore* also clarify that the exceptions are for cases where the law of the case doctrine applies, and the court must reconsider the ruling if any of the three exceptions apply. *See also Mid-Am. Pipeline Co. v. Four-Four, Inc.*, 2009 UT 43, ¶¶ 13-15, 216 P.3d 352, 355-56 (holding that the replacement judge did not abuse his discretion by re-visiting the previous judge’s order for a fairness hearing).

McLaughlin and *Blackmore* go on to explain that if the law of the case doctrine does not apply, the trial court is free to re-visit a previous ruling *sua sponte* or at the direction of one of the parties. *See also IHC Health Servs. v. D & K Mgmt.*, 2008 UT 36, ¶ 27. In *Blackmore*, Judge Shumate granted summary judgment to Blackmore on whether the defendants breached the material terms of the agreement. *Blackmore v. L&D Dev. Inc.*, 2016 UT App 130, ¶ 9. Judge Shumate granted a writ of attachment to Blackmore that the defendants appealed to this

court for interlocutory review. *Id.*, at ¶ 10. This court affirmed the writ of attachment, but vacated the remedy because it exceeded the scope of a prejudgment writ of attachment. *Id.* Judge Shumate subsequently recused himself from proceeding further with the case, citing a desire to appear impartial to the parties. *Id.*, at ¶ 11. After Judge Stott was assigned to the case, the defendants filed a motion to reconsider and set aside the previous summary judgment ruling. *Id.*, at ¶ 12. Judge Stott agreed with the defendants that the previous motion for summary judgment was made in error, and he set aside the previous ruling from Judge Shumate. *Id.* Analyzing the events leading up to the appeal, the court in *Blackmore* held that Judge Stott was well within his discretion to set aside the previous ruling because the law of the case doctrine and the mandate doctrine did not apply here. The court stated:

"The Utah Supreme Court has explained that the substitution of a new judge does not alter the court's discretion to modify a prior decision: 'Law of the case does not prohibit a district court judge from revisiting a previously decided issue during the course of a case, regardless of whether the judge has changed or remained the same throughout the proceedings. Rather, the doctrine allows a court to decline to revisit issues within the same case once the court has ruled on them.' McLaughlin v. Schenk, 2013 UT 20, ¶ 22, 299 P.3d 1139. 'While a case remains pending before the district court prior to any appeal, the parties are bound by the court's prior decision, but the court remains free to reconsider that decision . . . sua sponte or at the suggestion of one of the parties.' IHC Health Servs., 2008 UT 73, ¶ 27, 196 P.3d 588 (footnote omitted); ac-

cord Utah R. Civ. P. 54(b) (providing that when a case involves multiple claims or parties, any order or other decision that does not adjudicate all of the claims is subject to revision at any time before a final judgment on all the claims). ‘This is true even when a second judge has taken over the case because the two judges, while different persons, constitute a single judicial office.’ *PC Crane Serv., LLC v. McQueen Masonry, Inc.*, 2012 UT App 61, ¶ 43, 273 P.3d 396 (citation and internal quotation marks omitted). Three situations require the court to reconsider a matter: ‘(1) when there has been an intervening change of authority; (2) when new evidence has become available; or (3) when the court is convinced that its prior decision was clearly erroneous and would work a manifest injustice.’ *Mid-America Pipeline Co. v. Four-Four, Inc.*, 2009 UT 43, ¶ 14, 216 P.3d 352 (citation and internal quotation marks omitted). These exceptions to the law of the case doctrine ‘function only to dictate when the district court has no discretion but rather *must* reconsider a previously decided, unappealed issue.’ *Id.* Thus, the supreme court has observed that these ‘exceptions do not operate to bar a replacement judge from reconsidering an issue previously ruled on by a prior judge in the same case.’ *McLaughlin*, 2013 UT 20, ¶ 24, 299 P.3d 1139.” *Blackmore v. L&D Dev. Inc.*, 2016 UT App 130, ¶ 31 (emphasis added).

The court explained that the previous interlocutory appeal did not address issues ruled on by Judge Stott, and therefore did not fall under the law of the case doctrine or implicate the mandate rule for following the appeals court. *Id.*, at ¶ 32.

In the case at hand, Judge Harris recognized he had discretion to re-visit Judge Kennedy’s previous ruling on summary judgment, and Build acknowledged that the case law allowed Judge Harris discretion to change or overrule

Judge Kennedy. (R. 16135). At the hearing, Build again sought to strike the motions for clarification on the Legacy and Arcadia projects on the basis that were motions to reconsider under Rule 54(b), and that Build had no opportunity to address that issue in the briefing. (R. 16127). Judge Harris heard Build's argument, and on questioning, Build admitted as follows:

The Court: And Judge Kennedy would have the discretion, which he may or may not chose to exercise, he would have the discretion under Rule 54 and under the non-final order rules that come down from above, he would have the discretion to change or later or over-rule himself in any way he saw fit; right?

Mr. Trout: That would be true.

The Court: Okay. So why don't I have the same authorization? Sitting now in Judge Kennedy's seat? Discretion, I guess. I mean, I may want – I may not want to exercise it, but I want – I want to make sure I understand what you're telling me. Are you telling me that I don't have the discretion to examine these issues again?

Mr. Trout: *I'm not saying that at all, you certainly have that discretion. The case law is clear on that.* (R. 16135)(emphasis added).

Judge Harris understood that as a replacement judge for the case he had the discretion to change Judge Kennedy's previous ruling. The law of the case doctrine does not apply in this instance because the case was not on remand from an appeal. Judge Harris properly ruled the court would reconsider arguments made to Judge Kennedy, stating:

"I have the discretion to do this and I intend to exercise it here in this case today. I'm certainly not going to just throw up my hands and say: Well, Judge Kennedy made these rulings, so that's that. . . . I certainly appreciate the arguments being made [by Build] and I recognize that the defendants are, to a large degree and in some instances, the plaintiffs, too, are asking me to reconsider things Judge Kennedy decided. But I intend to listen to the parties today and – and may very well, depending on how the arguments go, I may very well end up making some changes to some things Judge Kennedy decided. I'm going to – I'm not going to simply reject those arguments simply because they've been made before. I'm convinced there's at least some issues I ought to listen to today." (R. 16142-43).

Build is now arguing that Judge Harris erred by overruling Judge Kennedy's ruling. (*See* Brief of Appellant, p. 17 ¶ 2). Build would have the court believe that the law of the case doctrine does not allow for discretion in this case despite already admitting at the hearing that Judge Harris had discretion to change or overrule Judge Kennedy, and that the case law supported this discretion. After acknowledging that there are some instances when a judge has discretion to re-visit previous rulings, Build then makes the argument that the law of the case doctrine applies and that Clyde-Geneva and UDOT need one of the three exceptions to re-visit a previous ruling. (*See* Brief of Appellant, p. 28-29 ¶ 3). Build incorrectly asserts that the law of the case doctrine applies to this issue, and the Supreme Court of Utah has already explained that the law of the case doctrine does not apply when the case is not on remand or appeal.

Judge Harris did not violate the law of the case doctrine by making a *sua sponte* ruling for summary judgment in response to the motion for clarification. When Judge Harris took over the case from Judge Kennedy upon Judge Kennedy's retirement, the case was not on appeal or remand and Judge Harris's rulings were not subject to the law of the case doctrine. A judge or a subsequent judge assigned to the same case may re-visit a previous ruling at any time before the case is appealed and subsequently subject to the law of the case doctrine. Once the case is appealed or remanded back to the district court judge, this discretion is no longer valid unless one of the three exceptions applies, and at that point it becomes mandatory to re-visit the issue. The law of the case doctrine does not apply to this case, and Judge Harris had discretion to revisit any previous rulings at the request of the parties or on his own accord. Accordingly, this Court should affirm the dismissal of Build's consequential damages claim by Judge Harris.

iii. Build Waived its Argument that the District Court Could Not Reconsider its Prior Order.

If the district court erred in reconsidering its prior orders, it did so because Build invited the error. At the hearing, the district court asked Build's counsel whether it lacked the discretion to reconsider Judge Kennedy's prior orders.

Build's response was "you certainly have that discretion. The case law is clear on that." (R. 16135). Build should not now be allowed to argue to the contrary.

c. Build Failed To Ever Provide A Computation Of Its Consequential Damages.

Build has failed to comply with the Utah Rules of Civil Procedure, through failing to satisfy Rules 26(a)(1)(c) and 30(c)(2) through its repeated and continual failure to provide the amount of its alleged consequential damages, and has repeatedly sought to delay discovery. In its initial disclosures, Build stated that its damages had not yet be completely calculated and that "this initial disclosure will be timely supplemented upon completion of such calculation. Upon information and belief, Build asserts that this damage figure will exceed the sum of \$5,000,000.00" (*See Exhibit A, 140-141*). Despite this assertion and after more than three years of litigation, Build never provided a calculation of its consequential damages. In response to UDOT's Motion for Summary Judgment on Build's Consequential Damages Build filed a Declaration of Freddie Stromness regarding Build's consequential damages which stated that he thought Build was worth \$15 to 15.5 million dollars in 2006. (R. 3642). Alone this number did not provide an updated calculation as required by Rule 26(a)(1)(c).

Build has since claimed that it inadvertently failed to file a second declara-

tion on December 13, 2013 where Stromness stated Build's present value at \$140,000, and that the signature pages of the two declarations were also switched by mistake. Clyde-Geneva and UDOT do not dispute that Build's error was inadvertent. However, Clyde-Geneva and UDOT did not receive the second declaration until August 25, 2015—long after all discovery on this case was completed, and long after any party would have any opportunity to question Stromness on his opinions.

Even with the ultimate disclosure of the alleged \$140,000 present value of Build, Build has not provided an updated calculation of its consequential damages. During the hearing where Judge Harris made the decision to dismiss Build's consequential damages claim, Judge Harris asked Build to provide the calculation of its damages. In light of the numbers provided in Stromness' declarations, Judge Harris asked Build's attorney "are you standing here today telling me that your computation is \$15 million minus \$140,000, equals whatever that is . . . are you telling me that that's what your computation is? Or are you telling me it's something else or are you telling me you don't know?" To which Build's attorney responded "I'm telling you that that is not our computation." Judge Harris responded "What's your damages computation? What number are

you going to have somebody give to the jury . . . what is the number?" And the response was simply "I don't have that number as I stand here today . . . Have we disclosed that number? And the answer is no." (R. 16117-16441, p. 156-157).

Throughout discovery, Build avoided providing the computation of its consequential damages through contradictory deposition testimony, delay, and avoidance. In the first Deposition of Mr. Stromness, Mr. Stromness testified that Build's business devastation claim is based upon Joan Whitacre's report. (*See* Exhibit C, Stromness Depo, vol. 2 pp. 83-84). Then during Ms. Whitacre's deposition, the following interchanges occurred where she repeatedly denied having made any computation of damages:

Q: And is your report suggesting that Build has been damaged in the amount of \$15.4 million as a result of the nonpayment of the amounts they're claiming in this lawsuit?

A: There wasn't anywhere in my report where I computed damages.

Q: So your computation of that amount is not intended by you to be a representation of a damage amount?

A: It is not. (Exhibit D, Whitacre Deposition, p. 84).

Q: Are you offering an expert opinion at all as to the value of Build at any point in time?

A: I am not. (*Id.* p. 90).

Q: And I think you testified today, you're not expressing any expert opinion in this matter about the valuation of Build over any period of time either?

A: I am not.

Q: And you're not – you've never been asked to testify about any claim for business devastation?

A: I have not.

Q: You're not expressing any expert opinion about any business devastation claim?

A: I am not. (*Id.* pp. 119-120).

After Ms. Whitacre testified that she had not done any computations to determine the amount of Build's business devastation claim, Clyde-Geneva sought that exact information from Mr. Stromness in his second deposition. In an attempt to discover the amount of Build's business devastation claim, Clyde-Geneva asked the following questions, to which Build's attorneys instructed Mr. Stromness not to answer:

Q: Have you done any analysis of the books and records of Build, Inc. to make a determination as to what damages Build, Inc. sustained by reason of the business devastation?

MR. TROUT: I'm going to object to the form and instruct the witness not to answer. You are now moving into an area that's post the deposition that was conducted by UDOT, which Mr. Wilson attend-

ed. And I'm going to instruct him not to answer.

...

Q: As of this date, Mr. Stromness, have you made any analysis of any quantification of any damages sustained by Build, Inc. by reason of what you claim to be a business devastation by Clyde-Geneva?

MR. TROUT: Object. Same instruction. You are not allowed to answer that question.

...

Q: What amount of damages is Build seeking for business devastation against Clyde-Geneva and UDOT in this proceeding?

MR. TROUT: Object to the form of the question. It's been asked and answered. The witness is instructed not to answer. (See Exhibit __, Stromness Deposition, August 5, 2014, pp. 72-75, 108-109).

The trial court found that Build was "way out of bounds" in its instructions to Stromness not to answer deposition questions. (R. 16252) In fact, the Court found that thwarted discovery when counsel instructed Mr. Stromness not to answer questions by Clyde-Geneva's counsel at least 25 times. (See Exhibit B, Stromness Depo. August 5, 2014 5:6-7, 7:22-8:17, 8:24, 32:15-16, 51:6-7, 57:17-18, 60:2, 74:25, 75:10-11, 75:19, 87:22-23, 88:9-10; 89:19-20, 95:10, 95:14-15, 95:21-22, 106:25, 108:23-24, 109:4-5, 110:15, 111:19-20, 116:8, 129:2-3, 137:7-8, 137:12-13). Judge Harris took specific note of this and stated "So the question in my mind is, why did you not let these guys ask that question . . . you have three reasons

under the rule where you can instruct the witness not to answer and these particular instructions not to answer didn't fit into any of the three." (R. 16275). Counsel also prohibited any questions by UDOT or Clyde-Geneva regarding a declaration that Mr. Stromness issued after fact discovery was over, a document which potentially provided insight into the amount of Build's consequential damages. (*See* Exhibit B, 138-139). Again Judge Harris took note of this in the following interchange:

THE COURT: So basically, what you're saying is, our chief damages witness has some opinions to render about damages and because of the way this came out chronologically, they're never going to get a chance to depose our chief damages witness on the basis for his computation and his opinions.

MR. TROUT: That's really not what we're saying.

THE COURT: But that's the effect of it. (R. 16282-83).

Build further delayed and avoided providing this relevant information in Mr. Stromness' deposition where he answered that he had no recollection, or words to that effect, at least 50 times. He also answered that he relied on the advice of his certified public accountants, although he was unwilling or unable to describe that advice at all, at least 29 times. Furthermore, he routinely gave nonresponsive, repetitive answers that appeared to be pre-crafted by counsel

throughout his deposition (*See e.g.* Exhibit B, pp. 61-63), and gave answers that were clearly designed to frustrate and obstruct any meaningful discovery. For example, when asked to identify the pile driving equipment that Build used on the legacy project, Mr. Stromness began by listing the contents of a quarter-inch drive socket set—worth probably only a few dollars, and inconsequential to this case—rather than discuss the large pile hammers and cranes central to the case. (*See* Exhibit B, pp 37-38).

Build's discovery tactics astounded Judge Harris, and during the hearing he reiterated "you've admitted to me ten minutes ago, Mr. Fetzer, that even standing here today on your own two feet, on October 1st, 2015, you cannot give me or them what your damages number is. How—How is that possible? You've got an obligation to disclose that right up front and then you've got an obligation to seasonably supplement that so that those guys can explore it. And when they tried to explore it, Mr. Trout wouldn't let them." (R. 16117-16441, p. 162).

d. Build's Attorney Fees Are Not Consequential Damages.

Build asserts for the first time on appeal that, in addition to the value of its business, it also claims attorney's fees under a third-party tort rule theory as a component of its consequential damages. Since this argument is raised for the

first time on appeal, the Court need not address it because Build failed to preserve for appeal.

The Court should not consider Build's argument, that Judge Harris' dismissal of Build's consequential damages claim should be reversed because Build's consequential damages include attorney fees under the third-party tort rule in addition to the business devastation value. The Court of Appeals "generally will not consider an issue unless it has been preserved for appeal." *Myers v. Utah Transit Auth.*, 2014 UT App 294, ¶ 18, 341 P.3d 935, 940, *cert. denied sub nom. Myers v. UTA*, 347 P.3d 405 (Utah 2015) (citing *Patterson v. Patterson*, 2011 UT 68, ¶ 12, 266 P.3d 828). In order to preserve an issue for appeal "a party must specifically raise the issue 'in such a way that the trial court has an opportunity to rule on that issue.'" *Id.* (citing *438 Main St. v. Easy Heat, Inc.*, 2004 UT 72, ¶ 51, 99 P.3d 801).

Build has not preserved the argument that its attorney fees are consequential damages. In Build's Amended Complaint, Build presented a section titled "Consequential Damages from Concurrent Conduct." (R. 201). This section sets forth multiple different causes for its claimed consequential damages relating to Build's alleged business devastation, but does not include attorney fees as a

consequential damage. (R. 201-03).

Next, in an attempt to satisfy Rule 26(a)(1)(c) of the Utah Rules of Civil Procedure, Build's initial disclosures set forth its alleged damages. Build alleged three different types of damages. The first was Build's alleged damages based off UDOT's alleged contractual breaches relating to the I-215 and Arcadia projects and was based off of calculations set forth in Exhibit A which was attached to the disclosures. The second was Build's alleged damages relating to its contracts with Clyde-Geneva on the Legacy Project, which were based off of the calculations set forth in Exhibit B. Lastly, Build alleged a business devastation claim against both UDOT and Clyde-Geneva. This claim was set forth as follows:

In addition to the damages described above, Build suffered business devastation damages, including but not limited to **loss of future business opportunities, cash flow, and bonding and borrowing capacity**. These damages were foreseeable consequences of UDOT's failure to pay amounts due and owing to Build on each of the projects; and/or they were a direct and proximate result of UDOT's failure to pay amounts which UDOT knew, should have known, and/or acknowledged were due and owing to Build on each of the Projects. Such damages were also foreseeable consequences of UDOT's failure to participate in the Dispute Resolution Board process in good faith and of UDOT's breach of the partnering agreement with Build; and/or they were a direct and proximate result of UDOT demanding that Build engage in the Dispute Resolution Board process, in which UDOT never intended to participate in good faith and failed to participate in good faith. Such damages were also foreseeable consequences of UDOT's breaches of its contracts and relationships with

Build; or they were a direct and proximate result of UDOT's intentional, unreasonable, unconscionable, and willful deviation from reasonable standards of conduct, by which UDOT set out to, and furthered actions which were intended to, devastate Build's business, foreclose future business opportunities, and deprive Build of the cash flow required to sustain Build's business; or they were both. **The amount of such business devastation damages is being calculated, but is not yet complete. This initial disclosure will be timely supplemented upon completion of such calculation. Upon information and belief, Build asserts that this damage figure will exceed the sum of \$5,000,000.00.**

and

Clyde-Geneva's breaches of its subcontract with Build on the Legacy project, including its failure to present Build's claim fully and in good faith, caused foreseeable **business devastation damages, including loss of future business opportunities, cash flow, and bonding and borrowing capacity. The amount of such damages is being calculated and will be disclosed when the calculation is complete.**

(See Exhibit A, 140-141 (emphasis added)). Nowhere within Build's initial disclosures does it make specific reference to attorney fees as part of its consequential damages. Additionally, Build has not supplemented its disclosures to provide for a claim of attorney fees as consequential damages.

Beyond failing to include attorney fees as part of Build's consequential damages in its pleadings, initial disclosures and all supplements, in response to UDOT's Motion for Partial Summary Judgment regarding Build's Consequential Damages, Build stated that "Build's consequential loss claim . . . is for its future

profits” and “[t]he measure of damages for Build’s consequential loss is the lost profits measure” (R. 3587-88). Nowhere in this response does Build allege that its attorney fees are part of its alleged consequential damages. In the briefing and oral argument regarding Clyde-Geneva and UDOT’s Motion *In Limine* to Exclude testimony of Joan Whitacre and Freddie Stromness, Build never disclosed that it was incorporating its attorney fees as part of its consequential damages.

Additionally, after Judge Harris signed the order dismissing Build’s “claim for ‘Consequential Damages for Concurrent Conduct’ stated on pages 8 through 10 of its Amended Complaint,” Build neither objected, filed a motion to reconsider, nor filed a motion to clarify that Build’s consequential damages claim included attorney fees through the third-part tort rule.

Build’s appellate brief also fails to adequately point to where Build preserved this issue for appeal. In the Statement of the Issues, Build states that “evidence of consequential damages was preserved at R. 7173,” and yet this page of the record makes no mention of attorney fees as part of consequential damages. (*See* Brief of Appellant p. 3).

Build’s only argument that it has preserved this issue for appeal by previ-

ously alleging attorney fees as part of its consequential damages is tenuous at best and ultimately fails due to its own actions. Build could argue that attorney fees are implied where it stated in its Initial Disclosures that “[s]uch damages were also a foreseeable consequence of UDOT’s failure to participate in the Dispute Resolution Board process in good failed . . . and/or they were a direct and proximate result of UDOT demanding that Build engage in the Dispute Resolution Board process,” but this argument is unpersuasive. (*See* Exhibit A, Plaintiff’s Initial Disclosure 140). More problematic than the fact that these assertions do not clearly imply attorney fees is the fact that “such damages” refers to Build’s business devastation claim. Although, Build’s Appellate Brief claims that Kevin Nilsen is able to provide testimony as to Build’s attorney fees, Build’s attorney fees are a subset of the business devastation claim. At oral argument, Judge Harris specifically asked “Mr. Stromness is the one you have in mind to do this [testify about business devastation]?” to which Mr. Fetzer responded “Not just in my mind. Mr. Stromness is the man who will be testifying about that value.” (R. 15604). Furthermore, Build admits that Stromness will be Build’s witness regarding its business devastation claim in footnote 6 of its Appellate brief saying, “Build admitted that Mr. Stromness would testify

concerning Build's business devastation claim." (See Brief of Appellant p. 37).

Through its own admissions, Mr. Stromness was Build's only witness that could potentially testify as to the amount of Build's business devastation claim, and the only argument available to Build to claim that it preserved attorney fees as consequential damages is through its initial disclosures, which would place attorney fees as a subset of Build's business devastation claim. The exclusion of Stromness' testimony, and Build's only possible testimony as to the amount of its business devastation claim (which would include attorney fees) was based off of a Rule 37 sanction, which is reviewed for abuse of discretion. *Kilpatrick v.*

Bullough Abatement, Inc., 2008 UT 82, ¶ 23, 199 P.3d 957, 965; *Goggin v. Goggin*, 2013 UT 16, ¶ 26, 299 P.3d 1079, 1088.

Build has failed to preserve the issue of attorney fees as consequential damages. It has failed to cite to any instance in the record where this issue was preserved or even previously asserted. Additionally, in not bringing this issue to Judge Harris' attention after Judge Harris dismissed the entire consequential damages claim, Build failed to provide the trial court an opportunity to rule on the issue. Without providing the trial court an opportunity to rule on the issue of Build's attorney fees being a part of its consequential damages, Build failed to

preserve that issue for appeal. Because Build failed to preserve this issue for appeal, this Court should not consider the issue.

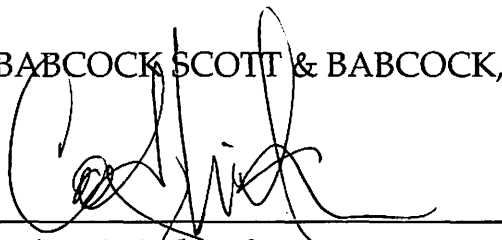
However, even if the Court finds that Build preserved this issue for appeal and that Build may be entitled to recover its attorney's fees, the consequential damages claim directly addressed in Build's pleadings, the motion for summary judgment, and the motion to exclude witnesses, and that Judge Harris ultimately dismissed is the value loss of Build's business. That claim should remain dismissed for the reasons set forth herein.

CONCLUSION

The district court correctly dismissed Build's claim for consequential damages. Because the law provides the district court the discretion to make the rulings it did, and because the substance of those rulings are correct, this Court should affirm the district court's order.

DATED this 24th day of October, 2016.

BABCOCK SCOTT & BABCOCK, PC

A handwritten signature in black ink, appearing to read 'Robert F. Babcock', is written over a horizontal line.

Robert F. Babcock

Brian J. Babcock

Cody W. Wilson

*Attorneys for Clyde-Geneva Constructors, W.W.
Clyde & Co., and Geneva Rock Products, Inc.*

Certificate of Service

I hereby certify that on this 24th day of October, 2016, a true and correct copy of **BRIEF OF APPELLEES CLYDE-GENEVA CONSTRUCTORS, W.W. CLYDE & CO., & GENEVA ROCK PRODUCTS, INC.** was served by the method indicated below, to the following:

Clark B. Fetzer FETZER SIMONSEN & BOOTH, P.C. 50 West Broadway, Suite 1200 Salt Lake City, UT 84101	<input checked="" type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivered <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> ECF
Kim J. Trout TROUT LAW, PLLC 3778 N. Plantation River Dr., Suite 101 Boise, ID 83703	<input checked="" type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivered <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> ECF
Stanford P. Fitts S. Spencer Brown STRONG & HANNI 102 South 200 East, Suite 800 Salt Lake City, UT 84111	<input checked="" type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivered <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> ECF

/s/ Sharon J. Ortega

Exhibit A

8/17/12

Clark B. Fetzer (#1069)
FETZER SIMONSEN & BOOTH, P.C.
50 West Broadway, Ste 1200
Salt Lake City, UT 84101
Phone: (801) 328-0266
Fax: (801) 328-0269
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Boise, ID 83701
Phone: (208) 331-1170
Fax: (208) 331-1529
KTrout@idalaw.com
Attorneys for Plaintiff

**IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH**

BUILD INC., a Utah corporation,

Plaintiff,

vs.

UTAH DEPARTMENT OF
TRANSPORTATION, an agency of the State
of Utah; CLYDE-GENEVA
CONSTRUCTORS A JOINT VENTURE, a
Utah joint venture; W.W. CLYDE & CO., a
Utah corporation; and GENEVA ROCK
PRODUCTS, INC., a Utah corporation,

Defendants.

**PLAINTIFF'S
INITIAL DISCLOSURES**

Civil No. 090904101

Judge Kennedy

CLYDE-GENEVA CONSTRUCTORS A
JOINT VENTURE, a Utah joint venture;
W.W. CLYDE & CO., a Utah corporation;
and GENEVA ROCK PRODUCTS, INC., a
Utah corporation,

Third Party Plaintiffs,

vs.

UTAH DEPARTMENT OF
TRANSPORTATION,

Third Party Defendant.

Plaintiff, Build Inc. ("Build"), hereby makes the following disclosures pursuant to Rule 26 of the Utah Rules of Civil Procedure.

A. Individuals likely to have discoverable information:

The following individuals are likely to have discoverable information supporting plaintiff's claims or defenses. "Arcadia project," "I-215 project," and "Legacy project" have the meanings described in Build's Amended Complaint. "All projects" means the Arcadia project, I-215 project, and Legacy project. "FAK" means Fluor Ames Kraemer.

1. Brian Adams
UDOT
Legacy Parkway Legacy Design-Environmental Manager
801-383-3109

With respect to the Arcadia project, Brian, an employee of UDOT, may have created, or have knowledge of communications, meetings, and documents which were created or occurred in relation to the project.

261. Lorna Stradinger
Duchesne County
Commissioner
734 N Central Street
P.O. Box 910
Duchesne, UT 84021

With respect to the Arcadia project, Lorna may have created, or have knowledge of communications, meetings, and documents which were created or occurred in relation to the Project.

262. Roland Stanger
Roland.Stanger@fhwa.dot.gov

With respect to the Arcadia project, Roland may have created, or have knowledge of communications, meetings, and documents which were created or occurred in relation to the Project.

263. Tod Straw
UDOT
Legacy Parkway Legacy Segment 3 Inspector
801-447-3563

With respect to the Legacy project, Tod may have created, or have knowledge of communications, meetings, and documents which were created or occurred in relation to the Project.

264. Freddie Stromness
c/o Fetzer Simonsen & Booth, P.C.
801-328-0266

With respect to the Arcadia, I-215, and Legacy projects and Build's business devastation claim, Mr. Stromness, as President of Build Inc. has created, or has knowledge of communications,

meetings, and documents which were created or occurred in relation to the Projects . Mr. Stromness has direct personal knowledg of and understanding of the damage claims, the constructability issues on each of the Projects, and of the business devastation claim of Builds.

265. Richard Stromness
c/o Fetzer Simonsen & Booth, P.C.
801-328-0266

With respect to the Arcadia, I-215, and Legacy projects, Richard, is an employee of Build Inc., has created, or has knowledge of communications, meetings, and documents which were created or occurred in relation to the Project.

266. Leona Sullivan
UDOT
Legacy Parkway Legacy Environmental Oversight
801-383-3118

With respect to the Legacy project, Ms. Sullivan may have created, or have knowledge of communications, meetings, and documents which were created or occurred in relation to the Project.

267. Jesse Sweeten, PE
UDOT
Construction
POBS Engineer
801-965-3846

With respect to the I-215 project, Jesse Sweeten may have created, or have knowledge of communications, meetings, and documents which were created or occurred in relation to the Project.

268. Jason Taylor
Clyde Geneva Constructors

- b. AR_006104 - AR_006164*
- c. AR_008518 - AR_008948*
- d. AR_009185 - AR_010142
- e. AR_010293 - AR_010494*
- f. AR_012247 - AR_012268
- g. AR_019643 - AR_020045
- h. i2_000040 - i2_000113*
- i. i2_000563 - i2_000697*
- j. i2_004988 - i2_004991
- k. i2_001292 - i2_001356*
- l. i2_002991 - i2_003014*
- m. i2_005014 - i2_005143*
- n. LE_040447 - LE_041425
- o. LE_049906 - LE_049926
- p. LE_057366 - LE_058324
- q. LE_056776 - LE_057365

Other Documents and Files

- a. FAK00001 - FAK07185
- b. LE_056018 - LE_056775
- c. LE_054503 - LE_056775

GRAMA documents

- a. LE_016471 - LE024548

Photographs

- b. LE_054216 - LE_054502
- c. LE_055741 - LE_055810

C. Computation of Damages

Damages caused by UDOT

Attached hereto and incorporated as if fully set forth herein is a computation of categories of damages claimed by Plaintiff. Attached hereto as Exhibit "A" are the damage calculations for the Arcadia project as of August 15, 2012. Attached hereto as Exhibit "B" are the damage calculations for the Legacy project as of August 15, 2012. Included with the documents

produced herewith are documents and other evidentiary material upon which such computations are based.

With respect to the I-215 project, as stated in Build's Amended Complaint, Build's claims include but are not limited to UDOT's failure to promptly pay all amounts due, including but not limited to retainage, pursuant to the requirements of Utah law.

In addition to the damages described above, Build suffered business devastation damages, including but not limited to loss of future business opportunities, cash flow, and bonding and borrowing capacity. These damages were a foreseeable consequence of UDOT's failure to pay amounts due and owing to Build on each of the projects; and/or they were a direct and proximate result of UDOT's failure to pay amounts which UDOT knew, should have known, and/or acknowledged were due and owing to Build on each of the Projects. Such damages were also a foreseeable consequence of UDOT's failure to participate in the Dispute Resolution Board process in good faith and of UDOT's breach of the partnering agreement with Build; and/or they were a direct and proximate result of UDOT demanding that Build engage in the Dispute Resolution Board process, in which UDOT never intended to participate in good faith and failed to participate in good faith. Such damages were also a foreseeable consequence of UDOT's breaches of its contracts and relationships with Build; or they were a direct and proximate result of UDOT's intentional, unreasonable, unconscionable, and willful deviation from reasonable standards of conduct, by which UDOT set out to, and furthered actions which were intended to, devastate Build's business, foreclose future business opportunities, and deprive Build of the cash flow required to sustain Build's business; or they were both. The amount of such business

devastation damages is being calculated, but is not yet complete. This initial disclosure will be timely supplemented upon completion of such calculation. Upon information and belief, Build asserts that this damage figure will exceed the sum of \$5,000,000.00.

Damages caused by Clyde-Geneva

Exhibit "B," which is a computation of damages on the Legacy project, also applies as a computation of damages caused by Clyde-Geneva because Clyde-Geneva warranted the sufficiency of the pipe pile installation design. Clyde-Geneva also breached its subcontract with Build in respects including, but not limited to, failing to pay Build in full or in a timely manner for its work and failing to present Build's claims against UDOT fully and in good faith. In addition, Clyde-Geneva is responsible for quantum meruit damages, including but not limited to the benefit conferred by Build's performance of the Legacy project work that may be considered outside the scope of Clyde-Geneva's subcontract with Build on the Legacy project.

Clyde-Geneva's breaches of its subcontract with Build on the Legacy project, including its failure to present Build's claim fully and in good faith, caused foreseeable business devastation damages, including loss of future business opportunities, cash flow, and bonding and borrowing capacity. The amount of such damages is being calculated and will be disclosed when the calculation is complete.

D. Insurance Agreements

Plaintiff will produce a copy of policy no. CLP 3-238-160-B of Bituminous Insurance Companies.

Exhibit B

STATE OF UTAH

BUILD, INC., a Utah corporation,
Plaintiff,
v.
UTAH DEPARTMENT OF TRANSPORTATION, an agency of the State of Utah;
CLYDE-GENEVA CONSTRUCTORS A JOINT VENTURE, a Utah joint venture; W.W. CLYDE & CO., a Utah corporation; and GENERAL ROCK PRODUCTS, INC., a Utah corporation,
Defendants.
CLYDE-GENEVA CONSTRUCTORS A JOINT VENTURE, a Utah joint venture; W.W. CLYDE & CO., a Utah corporation; and GENEVA ROCK PRODUCTS, INC., a Utah corporation,
Third Party Plaintiffs,
v.
UTAH DEPARTMENT OF TRANSPORTATION,
Third Party Defendant.

Civil No. 090904101

DEPOSITION OF:
FREDDIE N. STROMNESS

TAKEN: August 5, 2014

Judge Kennedy

WITNESS

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Deposition of FREDDIE N. STROMNESS, taken on behalf of the Defendants Clyde-Geneva Constructors, W.W. Clyde & Co., and Geneva Rock Products, Inc., at the offices of Babcock Scott & Babcock, P.C., 505 East 20 South, Suite 300, Salt Lake City, Utah, before Jill C. Dunford, Certified Shorthand Reporter, pursuant to Notice.

A P P E A R A N C E S

For the Plaintiff:

Kim J. Trout
TROUT LAW, PLLC
3778 N. Plantation River Dr., Suite 101
Boise, ID 83703

For the Defendant Utah Department of Transportation:

Stanford P. Fitts
STRONG & HANNI
3 Triad Center, Suite 500
Salt Lake City, Utah 84180

For the Defendants Clyde Geneva Constructors, W.W. Clyde & Co., and Geneva Rock Products, Inc:

Robert F. Babcock
Cody W. Wilson
BABCOCK SCOTT & BABCOCK, PC
505 East 200 South, Suite 300
Salt Lake City, Utah 84102

Also Present: Richard Kluckhohn
Richard Stromness

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1 August 5, 2014 9:05 a.m.

P R O C E E D I N G S

FREDDIE N. STROMNESS,

called as a witness herein, having been first duly sworn
by the Certified Court Reporter to speak to the truth,
was examined and testified as follows:

MR. BABCOCK: The record can reflect this is
the continuation of the deposition of Freddie Stromness.

EXAMINATION

(BY MR. BABCOCK)

Q. Of course, you have been put under oath
again, so you understand you are under oath today?

A. I do.

Q. Are you under any medication today that would
impair your ability to answer the questions honestly
today?

A. No.

MR. TROUT: Bob, before we go any further,
I'd like to make a small record that this extension of
the Stromness deposition is done as a courtesy to you
based on your and Cody's request. And that it was agreed
to as an accommodation because of your specific request
related to the examination of Mr. Stromness regarding
accounting records. That was the specific item I recall
from our conversation during one of the conferences, in

1 particular one of our conferences, meet and confer
2 conferences. And that we intend to limit the deposition
3 testimony and that we don't consider it appropriate to
4 ask any questions related to items which have arisen
5 since Mr. Strommess's deposition was concluded last year.
6 And that questions that have been asked and answered will
7 not be answered again.

8 And that as we have noted in correspondence,
9 UDOT's participation will be limited and we will not
10 allow the deposition to be reopened with respect to the
11 UDOT's participation.

12 With that said, thank you for that opportunity
13 and we'll move forward.

14 MR. BABCOCK: We'll see how it impacts the
15 specific questions as we go.

16 MR. FITTS: A clarification, Kim. When you
17 mentioned limiting the deposition to exclude items that
18 have occurred since, as I understood what you said, items
19 that have occurred since the last time we had
20 Mr. Strommess in a deposition setting, that would include
21 specifically the last declaration of Mr. Strommess and
22 the attached exhibits. And that it's your intent that
23 questions about that would not be allowed and you would
24 instruct Mr. Strommess not to answer; is that correct?

25 MR. TROUT: That's highly likely.

5

1 THE WITNESS: As we sit here today, I have no
2 way to -- I have no recollection to answer one way or
3 another.

4 Q. (BY MR. BABCOCK) If we look at the last
5 page, page 66 of the report, it indicates that the total
6 costs that are posted on the report are just over 2.4
7 million.

8 Do you see that?

9 A. I do.

10 Q. Do you have any reason to believe that's not
11 an accurate representation of the total costs that Build
12 has claimed and incurred in performing the work on the
13 project?

14 MR. TROUT: Object to the form.

15 THE WITNESS: As we sit here today, I do not
16 know if there was a later version of this Job Cost Detail
17 Listing. If you have another document that might help
18 me...

19 Q. (BY MR. BABCOCK) Did you review your
20 transcript of your prior deposition before coming today?

21 A. I did not.

22 MR. TROUT: I'll save you some time. I'm not
23 going to have you ask him any questions about his
24 deposition transcript. And if you perceive that you are
25 going to do that, we can short circuit this process right

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1 Q. (BY MR. BABCOCK) Let me show you what has
2 been previously marked as Exhibit 99. Do you recognize
3 that document?

4 A. Let me take a moment to look through this.

5 (Witness reviewed exhibit.)

6 A. I have reviewed this exhibit, Mr. Babcock.

7 Q. Thank you. As I understand it, this is the
8 latest Job Cost Report. It that your understanding as
9 well?

10 MR. TROUT: Object to the form.

11 THE WITNESS: No.

12 Q. (BY MR. BABCOCK) Do you know which report is
13 the latest Job Cost Report?

14 MR. TROUT: Same objection.

15 THE WITNESS: As we sit here today, I do not
16 know.

17 Q. (BY MR. BABCOCK) Why, as you sit here today,
18 do you think this is not the latest Job Cost Report?

19 MR. TROUT: Object to the form.

20 THE WITNESS: It has the date on it affixed
21 to every page, March 18th, 2008.

22 Q. (BY MR. BABCOCK) Are you aware of any job
23 costs that were incurred by Build that are not reflected
24 in this report?

25 MR. TROUT: Object to the form.

1 now.

2 MR. BABCOCK: I'm going to have him review --

3 MR. TROUT: He's not doing it. Sorry. You
4 wouldn't have had that opportunity in front of the court
5 reporter at the time of the original deposition. You're
6 not going to have that opportunity now. I'm not going to
7 have him answer questions regarding what he may or may
8 not have said in that transcript. He said what he said.
9 And the record, whatever it might be, will speak for
10 itself.

11 MR. BABCOCK: It absolutely will, Kim. I'll
12 ask the question and you can pose your objection. I'm
13 trying to -- since the witness didn't review it and
14 doesn't recall, I'm trying to start off with accounting
15 questions.

16 MR. TROUT: I apologize, Bob, we're not going
17 to go there.

18 Q. (BY MR. BABCOCK) You were asked this
19 question, on page 114 of the transcript. "Are you aware
20 of any later Job Cost Detail Listing?" On line 8, if you
21 will look at that and see what your answer was, if you
22 recall if there was any later Job Cost Detail Listing?

23 MR. TROUT: I'm going to object to the
24 question and instruct the witness not to answer, not to
25 respond in any fashion. This is not cross examination on

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1 a prior transcript.
2 Q. (BY MR. BABCOCK) You have been instructed
3 not to answer; is that right, Fred?
4 MR. TROUT: I can respond for him. He's been
5 instructed not to answer and he's not going to respond.
6 Q. (BY MR. BABCOCK) Go back to the first page
7 of that exhibit. I'd like to ask you about some of the
8 entries in the Job Cost Detail Listing, Exhibit 99.
9 Lines 6 and 7 on that entry, entries 6 and 7,
10 March 26th of '07 and March 27th of '07.
11 A. Would you point those out what you are
12 referring to? I don't see anything marked with a line.
13 Q. Do you see where there are a couple of
14 entries that say "Move costs to 1069 TMT per FS"?
15 A. I do see that.
16 Q. Can you tell me what that means?
17 A. As we sit here today, I cannot tell you what
18 that means. I can tell you that I relied on the advice
19 of my CPAs in all transactions.
20 Q. Is TMT, are they the initials for Tina Tullis
21 in your office?
22 A. I do not believe so.
23 Q. Do you know what the TMT stands for?
24 A. I do not.
25 Q. It says "Move costs to 1069." 1069 is the

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1 in March of 2007, if you recall.
2 Q. (BY MR. BABCOCK) Excuse me, I didn't ask you
3 what you told the accountant. I asked what the
4 accountant, the advice the accountant gave you, if you
5 had a discussion with an accountant on or about March 26
6 or 27th of 2007?
7 MR. TROUT: I'll object to the form of that
8 question.
9 THE WITNESS: Would you restate the question
10 then, Mr. Babcock?
11 Q. (BY MR. BABCOCK) You testified today that
12 all of the transactions were done on the advice of your
13 accountant, I believe. I think that's what your
14 testimony was?
15 A. That is correct.
16 Q. So here is the transaction on March 26th and
17 27th where costs are moved. It says "move costs." You
18 take out 6,000 and you add in 12,000, roughly.
19 Do you see that?
20 MR. TROUT: Object to the form of the
21 question.
22 THE WITNESS: I see a transaction amount.
23 Q. (BY MR. BABCOCK) One is a credit and one is
24 an addition?
25 MR. TROUT: Same objection.

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1 your job number for the Legacy project; is that right?
2 A. Job 1069 is the Legacy project.
3 Q. So it says "Move costs to 1069 TMT per FS."
4 Who is per FS?
5 A. I would be supposing to answer that question.
6 But I will tell you that what is recorded, all
7 transactions were on advice of my certified public
8 accountants.
9 Q. Do you think the FS are your initials for
10 Fred Stromness?
11 MR. TROUT: If you know.
12 THE WITNESS: I cannot answer that with
13 certainty, Mr. Babcock, just as I do not know what TMT
14 stands for. It is possible one way or another.
15 Q. (BY MR. BABCOCK) Do you recall having any
16 discussion on or about March 26 of 2007 with your
17 accountant about making any adjustments to costs for the
18 Legacy project?
19 MR. TROUT: Object to the form. Calls for
20 privileged communication. I'll instruct the witness not
21 to answer.
22 MR. BABCOCK: Do you think there's some
23 privilege?
24 MR. TROUT: I will withdraw the objection.
25 You can answer, if you recall what you said to somebody

1 Q. (BY MR. BABCOCK) Am I accurately reading
2 that?
3 MR. TROUT: Same objection.
4 THE WITNESS: One has a minus in front of it.
5 Q. (BY MR. BABCOCK) Do you know what that
6 means?
7 A. In that situation, not exactly.
8 Q. Back to the question, do you recall having a
9 discussion with your accountant on or about March 26th or
10 27th of 2007 about moving any costs to this job?
11 A. As I sit here now, I do not have any
12 recollection at all, not even one I could connect or
13 suppose something from.
14 If you have another document that would help me,
15 I would happily review it and see if it jogs my memory.
16 Q. Let's suppose that your accountant -- strike
17 that.
18 How would your accountant give you advice on such
19 items as moving costs to this job? Would you have verbal
20 discussions with the accountant? Would you have written
21 communication with the accountant? Tell me about how
22 that would happen. What is the nature of your
23 communication to have adjustments made?
24 A. There were certainly verbal communications.
25 There were certainly written communications. I relied

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1 invoices you received for equipment that you rented or
2 purchased for the project? Strike that.

3 Do you believe this cost category is a category
4 where invoices you received from these entities that
5 provided equipment on the job were posted?

6 MR. TROUT: Object to the form.

7 THE WITNESS: I think I'd need to review each
8 transaction and each invoice --

9 Q. (BY MR. BABCOCK) Would it have been --

10 A. -- to know the answer.

11 Q. Would it have been your direction to your
12 cost accounting people to post each cost that you
13 incurred to the Job Cost Detail Listing Report?

14 MR. TROUT: I'll object to the form.

15 THE WITNESS: Build's certified public
16 accountants did direct Build's accounting staff.

17 Q. (BY MR. BABCOCK) Did you give any direction
18 to the accounting staff?

19 A. In following the advice of Build's CPAs, it
20 is certainly plausible, although I can't recall a
21 specific instance as we sit here where I did direct
22 Build's staff.

23 Q. Do you believe you would have instructed them
24 to post to the job any invoice that the company received
25 that was attributable to the Legacy project?

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1 job cost accounting report?

2 A. Mr. Babcock, I followed the advice and
3 direction of Build's certified public accountants.

4 Q. I know. That's what you said. I asked you
5 did they give you advice to post the invoices of costs of
6 this job to your job cost ledger? Is that the kind of
7 advice they gave you?

8 MR. TROUT: Object to the form.

9 THE WITNESS: I understand your question asks
10 me to answer in greater detail.

11 As we sit here today, I can tell you that I
12 relied upon Build's certified public accountants to
13 direct me, advise me, and direct my staff to create these
14 entries.

15 Q. (BY MR. BABCOCK) You keep telling me you
16 followed their advice. I keep asking you what their
17 advice was. Did they advise you to make sure that all of
18 the invoices that Build received for costs incurred on
19 this project were posted as entries in the job cost
20 ledger?

21 A. I believe I understand your question and I
22 believe you are asking me to answer in greater detail
23 than I can answer. So my answer to you, Mr. Babcock,
24 sir, is that I did follow the advice and direction of
25 Build's certified public accountants.

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1 MR. TROUT: Object to the form. Asked and
2 answered.

3 THE WITNESS: I certainly do not think I
4 would have done anything contrary. In fact, I'm certain
5 I wouldn't have done anything contrary to the advice and
6 direction I received from Build's CPAs. I'm not sure
7 that answers your question, but...

8 Q. (BY MR. BABCOCK) It doesn't. I asked if you
9 gave direction to your staff to make sure they posted all
10 of the invoices to your job cost records that were for
11 costs incurred on this project.

12 A. I followed the direction.

13 MR. TROUT: Hold on. Excuse me. Object to
14 the form. Asked and answered. I'm not sure it's a
15 question. It's a statement. You can answer if you
16 understand.

17 THE WITNESS: Will you read back the
18 objection?

19 (The record was read by the court reporter.)

20 THE WITNESS: Thank you for that. I followed
21 the direction I received and the advice I received from
22 Build's certified public accountants.

23 Q. (BY MR. BABCOCK) Did Build's CPAs give you
24 advice to post all invoices that Build received
25 attributable to the Legacy project to the Legacy project

1 Q. Okay. But you have no recollection of what
2 the advice was they gave you?

3 A. Not with the detail you are requesting me to
4 answer.

5 Q. You were the president of the company;
6 correct?

7 A. At what time period, sir?

8 Q. 2007.

9 A. I believe that's correct.

10 Q. And as the president of the company, did you
11 give direction to your accounting staff to make sure that
12 all of the invoices that the company received for costs
13 attributable to the Legacy project were, in fact, posted
14 into your job cost reports?

15 MR. TROUT: I'm going to object and instruct
16 the witness not to answer. Again, he's answered that
17 question a number of times, sir. And I respectfully
18 request that you move on.

19 You are instructed not to answer again.

20 MR. BABCOCK: The record can reflect despite
21 being asked that question several times, he has refused
22 to answer the question.

23 MR. TROUT: That's incorrect. We'll agree to
24 disagree. The record reflects that he answered your
25 question. You just don't like the answer, sir, and

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1 or something to that effect.
2 Q. So give me the best of your recollection of
3 the pieces that were there.
4 A. Okay. So once we start down this path, I'm
5 going to work on it for a while.
6 Q. Okay.
7 MR. FITTS: We have been going for a little
8 bit. Would this be a good time to break and perhaps let
9 Mr. Strommess think about this for a minute while we all
10 take a break? We have been going a little over an hour.
11 MR. BABCOCK: That's fine.
12 (13-minute recess.)
13 MR. BABCOCK: Back on the record.
14 Q. (BY MR. BABCOCK) We are back on the record.
15 Fred, could you identify for me pile driving equipment
16 that Build used on the Legacy project?
17 A. Yes, prefaced with my comment directly before
18 the break.
19 I feel reasonably certain that there was a
20 quarter-inch drive socket set that contained a
21 5/16th-inch socket, a 3/8th-inch socket, a 7/16th-inch
22 socket, a half inch, a 9/16th.
23 Q. Fred, would a socket set like that be cost
24 coded under Pile Drive Equipment?
25 A. Are you speaking -- forgive me, but I haven't

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1 would have to suppose to answer it.
2 Q. So the first piece of equipment that comes to
3 mind when I asked you what pile driving equipment used
4 was a quarter-inch socket set; is that right?
5 MR. TROUT: I'm going to object to the form
6 of the question. It's argumentative. I instruct him not
7 to answer.
8 Q. (BY MR. BABCOCK) What pile driving -- what
9 pieces of equipment drove the piles for Build on the
10 Legacy project?
11 MR. TROUT: I'll object to the form. It's
12 been asked and answered in the prior deposition. I'm not
13 sure we need to cover that ground again. But I'll allow
14 him to answer it one more time.
15 THE WITNESS: The socket set I just spoke of
16 played a part in driving the pile on Legacy.
17 Q. (BY MR. BABCOCK) What piece of equipment
18 actually drove the piles?
19 MR. TROUT: Same objection. You can answer.
20 THE WITNESS: There is no single piece of
21 equipment, Mr. Babcock, that drove the pile. It takes a
22 collection of equipment to drive a pile.
23 Q. (BY MR. BABCOCK) What is the most important
24 piece of equipment -- strike that.
25 What is the most expensive piece of equipment you

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1 finished.
2 Q. You are talking about a socket set; right?
3 A. I'm talking about a 1/4-inch drive socket set
4 used as equipment on the Legacy Highway project. The
5 specific one I'm thinking of is a six point drive.
6 Contained in that socket set --
7 Q. I don't need to know what is contained in it.
8 I just asked you a piece of equipment. So it was a
9 socket set?
10 A. I'm answering your question, sir, to the best
11 of my ability.
12 Q. Beyond the socket set, is it your direction
13 that costs for a socket set would be cost coded to the
14 Pile Drive Equipment category of 02352? Did you
15 understand my question?
16 A. I followed the direction and advice I
17 received from Build's CPAs.
18 Q. Who owned that socket set you just talked
19 about?
20 A. If I'm not mistaken, it was owned by Build,
21 Inc.
22 Q. Was an invoice generated for that socket set
23 that was posted to the Job Cost Report?
24 A. As we sit here today, I have no recollection.
25 And as we started that question I informed you that I

1 used to drive the pile?
2 A. It varies. A crane can be more expensive
3 than the pile hammer. The forklift can be more expensive
4 than a pile hammer at times.
5 Q. Were there any pile hammers used by Build on
6 this project?
7 A. There were.
8 Q. Which pile hammers did Build use?
9 A. Build used an APE150. Build used an APE300.
10 Build used an IHCS-70. Build used an IHCS-90. And Build
11 used what has been referred to as the BFH.
12 Q. I want to review those five pieces for a
13 minute. Who owned the APE150?
14 A. If memory serves me, that was a hammer that
15 Build owned in its inventory.
16 Q. The APE300, who owned that?
17 A. If memory serves me, Build owned that at that
18 point in time too, understanding that some stuff may have
19 been on a rental purchase option, it might be one way or
20 another at a certain point in time.
21 Q. For the APE300?
22 A. Yes.
23 Q. Who are you potentially renting it to
24 purchase? Rent to own or lease option? What do you
25 recall?

1 Culp?
2 MR. TROUT: Object to the form.
3 THE WITNESS: Build's request for equitable
4 adjustment was prepared by project analysts and I'm not
5 certain if Mr. Culp would define himself as the primary
6 author.
7 Q. (BY MR. BABCOCK) At any rate, it's the
8 project analyst's request for equitable adjustment that
9 you say provides a breakdown of the resources that had
10 been expended by Build?
11 A. Would you repeat the question? It seemed to
12 change form between the first time it was asked and the
13 second time it was asked. And I'm not sure why we
14 changed the form of the question or the way it was asked.
15 MR. BABCOCK: Would you read it back.
16 (The record was read by the court reporter.)
17 THE WITNESS: I believe that's a fair
18 statement.
19 Q. (BY MR. BABCOCK) Would the resources
20 expended by Build include the labor dollars that it
21 spent?
22 A. I believe those costs are included in Build's
23 request for equitable adjustment. Perhaps it would be
24 beneficial to review it so we could -- if you want to ask
25 in detail what's in there.

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1 Q. (BY MR. BABCOCK) I ask you one more time,
2 Mr. Strommess. To the best of your knowledge, are all
3 the labor costs incurred by Build, Inc. reflected in this
4 job cost report?
5 MR. TROUT: I'm going to object. The
6 question has been asked and answered. I'm going to
7 instruct the witness not to answer it again.
8 Q. (BY MR. BABCOCK) Can you tell me any cost
9 incurred by Build, Inc. that is not reflected in the job
10 cost report maintained by Build, Inc. for the Legacy
11 project?
12 A. As we sit here today, I cannot -- can simply
13 report to you that I relied upon CPAs, Build's certified
14 public accountants, to review and create an accurate
15 record.
16 Q. Did Build's CPAs create the Job Cost Detail
17 report that's before you as Exhibit 99?
18 A. Build's certified public accountants provided
19 advice, direction, and review of Build's accounting.
20 Q. I ask you again, because you didn't answer
21 the question, did the CPA prepare and make this job cost
22 report, make the entries that make up this job cost
23 report? Is this something they generated or is this
24 something generated by your people at Build?
25 MR. TROUT: Object to the form of the

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1 Q. You have said that, to the best of your
2 recollection and understanding, the resources expended
3 that you are requesting are what is reflected in the
4 project analyst's prepared RAE; is that right?
5 MR. TROUT: Objection. Asked and answered.
6 THE WITNESS: So we are clear and on the same
7 page, you asked what resources Build expended
8 accomplishing the extra work that Clyde-Geneva and UDOT
9 directed Build to accomplish and which work Build
10 expended its resources and for which work Clyde-Geneva
11 and UDOT did not pay Build. And those costs are as
12 outlined in Build's REA, which nonpayment devastated
13 Build's business.
14 Q. (BY MR. BABCOCK) I appreciate your
15 recitation of that. I was asking you questions about the
16 resources that were expended.
17 Are all of the labor costs that were expended by
18 Build, Inc. reflected in the job cost report Exhibit 99
19 we have been referring to today?
20 MR. TROUT: Object to the form. I believe it
21 also misstates prior testimony. You can answer one more
22 time and then we'll move on.
23 THE WITNESS: Mr. Babcock, I relied on
24 Build's certified public accountants for advice and
25 direction.

1 question.
2 THE WITNESS: Forgive me if I didn't answer
3 that with the detail you wanted.
4 Build's CPAs provided oversight, direction, and
5 reviewed what Build's accounting staff created. The
6 entries are by and large by accounting clerks.
7 Q. (BY MR. BABCOCK) Have you had any discussion
8 with any of the CPAs for Build, Inc. that led you to
9 believe that the job cost report, Exhibit 99, does not
10 accurately reflect the costs incurred by Build, Inc. in
11 performing the work?
12 A. Mr. Babcock, I have no such recollection of
13 any such conversation.
14 Q. Do you have any recollection of -- after this
15 report of March of 2008, do you have any recollection of
16 after having discussions with your CPA that Build, Inc.
17 revised its job cost report for the Legacy project?
18 A. As we sit here today, I have no such
19 recollection of a revised Job Cost Detail Listing.
20 Q. Do you believe that report captures not only
21 the labor dollars expended, but also costs paid out for
22 materials, for subcontractors, for equipment, whatever
23 costs were paid by Build, Inc., do you believe that the
24 job cost report, Exhibit 99, reflects all of those costs
25 that were paid out by Build, Inc.?

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1 THE WITNESS: As we sit here today,
2 Mr. Babcock, I can't think of anything that Build didn't
3 pay. I'm not aware of anything Build did not pay as I
4 sit here right now.
5 Q. (BY MR. BABCOCK) And payments that Build
6 made for costs incurred, to the best of your knowledge,
7 are reflected in the Job Cost Detail report that's in
8 front of us today?
9 MR. TROUT: Object to the form. Asked and
10 answered.
11 THE WITNESS: I followed, Build followed the
12 advice, the direction, and the review of Build's
13 certified public accountants.
14 Q. (BY MR. BABCOCK) Was that an answer to my
15 question?
16 MR. TROUT: That's argumentative. You don't
17 need to respond to that, Mr. Strommess. I'll instruct
18 you not to respond to that.
19 MR. BABCOCK: Read back my last question.
20 (The record was read by the court reporter.)
21 A. MR. TROUT: I'll object. It's been asked and
22 answered. You can answer one more time.
23 THE WITNESS: I believe my answer is
24 responsive to your question, Mr. Babcock, sir.
25 Q. (BY MR. BABCOCK) I asked if the costs are

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1 Q. Did Build have to borrow any funds from any
2 entity to pay any of the costs reflected in the Job Cost
3 Report, Exhibit 99?
4 A. So we're talking specifically about this
5 exhibit that's dated March 18th of 2008?
6 Q. No, we're talking about the costs, the \$2.4
7 million in costs. That's what was paid out according to
8 your report; right?
9 MR. TROUT: Object to the form. Asked and
10 answered.
11 THE WITNESS: Yes, sir.
12 Q. (BY MR. BABCOCK) But you received from
13 Clyde-Geneva more than the \$2.4 million; right?
14 A. Yes, sir.
15 MR. TROUT: Object to the form. Asked and
16 answered.
17 Q. (BY MR. BABCOCK) You claim that Clyde-Geneva
18 and UDOT didn't pay for extra work performed; right?
19 A. Would you restate that?
20 Q. You stated earlier you believe, your
21 contention is that Clyde-Geneva and UDOT didn't pay for
22 extra work performed by Build; correct?
23 A. That is correct.
24 Q. Are there any costs in performing that extra
25 work which are not reflected in Exhibit 99?

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1 reflected -- are you aware of any costs incurred that was
2 paid by Build, Inc. for performing the work on the Legacy
3 project, which is not reflected in the Job Cost Report
4 prepared under the direction and supervision of you and
5 your CPA and whoever else you want to talk about?
6 MR. TROUT: I'll object to the form of the
7 question as being argumentative and asked and answered.
8 THE WITNESS: And I'm getting confused by the
9 question at this point.
10 Q. (BY MR. BABCOCK) Let me restate it.
11 You said to the best of your knowledge, Build has
12 paid all of the bills related to this project; right?
13 A. That is correct, sir.
14 Q. It does it by writing a check; correct?
15 A. Or by some other method of payment.
16 Q. What other method of payment does Build use
17 other than writing checks?
18 A. There are other methods. I'm not certain as
19 we sit here today whether Build used another method such
20 as a credit card payment, a wire transfer.
21 Q. In your accounting for the job, are not
22 payments for those supposed to be posted to your job cost
23 ledger?
24 A. Build's accounting is as directed and
25 reviewed by Build's certified public accountants, sir.

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1 MR. TROUT: Object to the form. Asked and
2 answered. I'm going to instruct him not to answer. He's
3 been over this three times and we're done with this
4 category.
5 MR. BABCOCK: I respectfully would suggest
6 that my prior questions went to the cost of the job.
7 This question is specifically as to the extra work that
8 he is claiming. This is the first time I asked that
9 question.
10 MR. TROUT: I'll take you at your
11 representation. You can answer one more time,
12 Mr. Strommess.
13 THE WITNESS: Would you read back the
14 exchange between both the attorneys and the question,
15 because I think I may be missing something that
16 Mr. Babcock is asking me that's a nuance that I'm not
17 able to comprehend.
18 (The record was read by the court reporter.)
19 THE WITNESS: I'm not differentiating between
20 when you asked it before and when you are asking it this
21 time. So I'm going to give the same answer, but I don't
22 want you to get mad at me.
23 If you can clarify for me, I will sincerely try
24 again.
25 Q. (BY MR. BABCOCK) You stated that

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1 Q. (BY MR. BABCOCK) He testified about a job in
2 Wyoming that he felt had been underbid by half a million
3 dollars.

4 Do you recall that?

5 MR. TROUT: Object to the form of the
6 question.

7 THE WITNESS: I do recall that job and I
8 don't agree that it was underbid. I believe it is my
9 beyond a belief, it's not a belief, in my mind it's a
10 solid undisputed fact. Build was forced into the
11 position of making drastic damaging cuts to its business.

12 Q. (BY MR. BABCOCK) What cuts did it make?

13 A. From where I was sitting at the time, there
14 was no part of Build's business that wasn't impacted.

15 Q. I didn't ask what was impacted. I said what
16 was cut. Did you lay people off? Who was it? When were
17 they laid off?

18 MR. TROUT: Object to the form of the
19 question.

20 THE WITNESS: I'm very willing to take each
21 aspect of Build's business one at a time and discuss it.
22 I think you have addressed employees. Would you like to
23 discuss employees that were cut?

24 Q. (BY MR. BABCOCK) I asked you a question.
25 You said some business was cut. I'm asking for

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1 of the question. It's argumentative. Let's take a time
2 out. Freddie, let's go.

3 MR. BABCOCK: Time is running. We are never
4 going to finish today.

5 MR. TROUT: I'm sorry. If you would like
6 to stop being argumentative with my client, then
7 perhaps --

8 MR. BABCOCK: Will you instruct your client,
9 Kim, to answer the questions.

10 MR. TROUT: I have been and I'm sorry you
11 don't like the answers, Bob, but --

12 MR. BABCOCK: They're not answers.

13 MR. TROUT: If on this record you are going
14 to start yelling at my client so you are trying to
15 irritate him, we are going to end this deposition right
16 now. If that's your intent, we'll be out of here.

17 MR. BABCOCK: Kim, you know --

18 MR. TROUT: You can go talk to the Judge
19 about your argumentative questions and your yelling at my
20 client. I'm simply not going to allow that to happen.
21 Thank you very much.

22 MR. BABCOCK: I'll state this, Kim: I am
23 not -- I have no intent --

24 MR. TROUT: You are yelling at me right now
25 and I prefer that you not do that, sir. Thank you very

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1 specifics. What was cut? Equipment? People? When?
2 Who?

3 MR. TROUT: Object to the form of the
4 question. It's argumentative as stated and it's also
5 compound. So if you would like to ask a single question,
6 I'll ask the witness to respond to a single question.

7 Q. (BY MR. BABCOCK) I'll do it again. That's
8 what I started with. I said what was cut.

9 A. Please forgive me, Mr. Babcock. There was
10 nothing that is on a list that was not impacted that was
11 not cut. If you want to say cut is a different word than
12 impacted, I don't know if I can differentiate in this
13 circumstance. There is nothing that was not impacted/cut
14 as a result.

15 Q. Mr. Stromness, you used --

16 A. Of Clyde-Geneva's and UDOT's failure to pay
17 Build for the direct and extra work.

18 Q. I appreciate that. You used the word cut. I
19 just wanted to understand when you said you had to cut
20 what you meant. Can you tell me anybody that you cut?

21 A. Thank you for that question. Do you have
22 employee lists for that period of time that I can review?

23 Q. You don't recall who you cut that was
24 significant to you?

25 MR. TROUT: I'm going to object to the form

1 much.

2 MR. BABCOCK: I have no intent to be
3 argumentative with your client. I want your client to be
4 responsive to the questions. I have asked many, many
5 questions that are simple answers to answer and he is not
6 answering them. You know full well if you would instruct
7 him to please be responsive we can make a lot more
8 progress.

9 MR. TROUT: He is doing the best he can. We
10 will agree to disagree on whether he is being responsive.
11 Thank you.

12 (6-minute recess.)

13 Q. (BY MR. BABCOCK) Before we broke, I had
14 asked you if you could tell me about any specifics of any
15 person or equipment or something that was, quote, cut
16 from Build, Inc. as part of the business devastation
17 claim.

18 MR. TROUT: I'll object to the form. You can
19 answer.

20 THE WITNESS: My attention wasn't specific
21 enough to get the specific category you asked about. Did
22 you ask about a specific category of cuts?

23 Q. (BY MR. BABCOCK) No. Anything. Let me just
24 kind of cut through a little bit so we can speed this up.

25 My understanding is you have got an expert who

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1 has gone through to try and analyze the business
2 devastation claim. Is that right?

3 A. I am aware that Ms. Whitaker has undertaken
4 that task.

5 Q. You haven't undertaken the task to go through
6 the books and records of Build, Inc. to try to analyze or
7 come up with a damage calculation for any business
8 devastation claim?

9 MR. TROUT: I'm going to object to the form
10 of that question.

11 THE WITNESS: My knowledge, my education, my
12 experience does not give me the understanding. My
13 experience does not give me the understanding I perceive
14 I need to answer your question, sir.

15 I know that Ms. Whitaker undertook to create --
16 undertook to create a report, but its depth, its
17 breadth --

18 Q. (BY MR. BABCOCK) I'm not asking you about
19 her report. That's her report. I'm asking if you have
20 done any analysis where you are saying this is what the
21 damage is worth that Build, Inc. sustained because of
22 this business devastation.

23 MR. TROUT: Object to the form of the
24 question.

25 THE WITNESS: My own determination based upon

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1 moving into an area that's post the deposition that was
2 conducted by UDOT, which Mr. Wilson attended. And I'm
3 going to instruct him not to answer.

4 MR. BABCOCK: What? Let's go off the record.
5 (Off-the-record discussion.)

6 MR. BABCOCK: We'll go back on the record.

7 Q. (BY MR. BABCOCK) Are you going to testify at
8 trial as to any damages sustained by Build, Inc. by
9 reason of the business devastation?

10 MR. TROUT: I'm going to instruct the witness
11 not to answer that question. That's a strategic decision
12 between he and his attorney in this matter. It's
13 privileged. He is instructed not to answer.

14 Q. (BY MR. BABCOCK) As of this date,
15 Mr. Strommess, have you made any analysis of any
16 quantification of any damages sustained by Build, Inc. by
17 reason of what you claim to be a business devastation by
18 Clyde-Geneva?

19 MR. TROUT: Object. Same instruction. You
20 are not allowed to answer that question.

21 MR. BABCOCK: I'll take that to the Judge
22 among many other things, but we'll keep plowing.

23 Q. (BY MR. BABCOCK) We were talking about
24 equipment owned by the sister companies or affiliates,
25 related companies, whatever term. You have talked about

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1 my personal involvement expending every bit of knowledge
2 and know how I have, then coupled with Mr. Nielsen's
3 expertise, knowledge, background, understanding that he
4 put us out of business. The devastation is complete, 100
5 percent.

6 Q. (BY MR. BABCOCK) The fact that Build is out
7 of business -- strike that.

8 Have you done any analysis to form an opinion as
9 to the dollar value for any loss of business or business
10 devastation experienced by Build, Inc.?

11 MR. TROUT: Object to the form.

12 THE WITNESS: Would you repeat again, sir,
13 please?

14 Q. (BY MR. BABCOCK) You said Build is out of
15 business; right?

16 A. Yes, sir.

17 Q. In the case there's a claim that there was a
18 business devastation to Build; right?

19 A. Correct.

20 Q. Have you done any analysis of the books and
21 records of Build, Inc. to make a determination as to what
22 damages Build, Inc. sustained by reason of the business
23 devastation?

24 MR. TROUT: I'm going to object to the form
25 and instruct the witness not to answer. You are now

1 Bountiful Construction.

2 Do you recall what equipment Bountiful
3 Construction provided to Build, Inc. for use on the
4 Legacy project?

5 A. I am recalling with certainty that all three
6 IHCS70s were on the project. And I only believe that
7 only one of those was owned by BCI, actual equipment.

8 Q. Let me try and do it this way: Is there a
9 BCI equipment list?

10 A. Yes.

11 Q. And on that equipment list -- what was the
12 value, approximately, of the equipment on the equipment
13 list at BCI back in the 2007 time frame? Do you have any
14 recollection?

15 A. I do not, sir. To say a number would be
16 hazarding a guess.

17 Q. But at least one of the IHCS70s was on that
18 list and that was used by Build on the Legacy project; is
19 that correct?

20 A. I do remember with certainty that all three
21 IHCS70s were used on Legacy. I believe that one of those
22 hammers was owned by Bountiful Construction, Inc.

23 Q. We have covered that. Anything else owned by
24 BCI that came to the Legacy job?

25 A. As I sit here today -- and trust me, I am

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1 its business from.

2 Q. Do you think you would post a real estate
3 lease under Account 72000 titled Equipment Lease?

4 A. That casts a great deal of suspicion on my
5 previous answer. Please trust me that I did not try to
6 mislead anyone. I don't know what that entry is for.

7 Q. Build, Inc. was leasing equipment from BCI?

8 A. That's a possibility, sir.

9 Q. So far what you told me about was a couple of
10 pieces of equipment that you thought BCI had, one of the
11 IHC70s and then a rubber-tired hoe I think you said?

12 A. That's what I'm recalling as we sit here.

13 Q. On the third page, about the sixth item down
14 there is an entry to Mary N., equipment lease, \$57,342.

15 Can you tell me who the \$57,342 was paid on
16 October 15, 2007?

17 A. I know of no other Mary N. other than my
18 mother.

19 Q. Do you know why it would be an Invoice 101507
20 against which a \$57,342 payment was made to Mary N?

21 A. I don't have a specific recollection of that
22 transaction, but I feel certain that Build's certified
23 public accountants advised, directed, and reviewed that
24 payment. I have continued to think about that, and there
25 is nothing that comes to mind that would help me give an

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1 anticipate driving when you bid the project?

2 A. Mr. Babcock, as we sit here today, I don't
3 have a number in my head for the question you asked.

4 Q. Did you drive more lineal feet on the project
5 than you anticipated?

6 MR. TROUT: I'm going to object to the form
7 of the question. It assumes he knows the answer to your
8 previous question, which he said he did not.

9 THE WITNESS: Would you mind restating the
10 question? Just see if my memory brings anything up.

11 MR. BABCOCK: Will you read it.

12 (The record was read by the court reporter.)

13 MR. TROUT: Just so the record is clear, I'll
14 state the same objection.

15 THE WITNESS: As we sit here in August of
16 2014, I am not recalling those sorts of numbers that you
17 are asking me to remember. I do apologize to you for
18 that.

19 Q. (BY MR. BABCOCK) It is your belief as we sit
20 here today that Build was not paid the unit price for
21 every lineal foot of pile that it drove?

22 MR. TROUT: Object. Asked and answered. I
23 instruct the witness not to answer again.

24 Q. (BY MR. BABCOCK) How many lineal feet did
25 you install that you were not paid for?

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1 answer.

2 Q. Did Clyde-Geneva pay for every lineal foot of
3 piles that Build drove on the project?

4 MR. TROUT: Object to the form.

5 THE WITNESS: Mr. Babcock, I'm just going to
6 state what I perceive is contained in your question.

7 Q. (BY MR. BABCOCK) It's a yes or no question.
8 It's not a speech question.

9 A. Oh, okay.

10 Q. Did you get paid for every -- did you get
11 paid a unit price for every foot of pile that was driven
12 on the job?

13 A. No.

14 Q. Pardon?

15 A. No, sir.

16 Q. How many unit feet of pile driving did you
17 not get paid for?

18 A. As we are sitting here today, I think the
19 best way I can answer your question is to inform you that
20 those costs are contained in Build's request for
21 equitable adjustment.

22 Q. How many lineal feet of piles did Build drive
23 on the project?

24 A. Mr. Babcock, I don't know.

25 Q. How many lineal feet of piles did you

1 MR. TROUT: Same objection. The question
2 presumes an answer to the prior question which the
3 witness said he did not recall.

4 THE WITNESS: Mr. Babcock, your question -- I
5 cannot answer your question as asked.

6 Q. (BY MR. BABCOCK) You don't know if you put
7 in more pile than you anticipated and, if so, how much it
8 was?

9 MR. TROUT: Same objection. Same instruction
10 to the witness. Asked and answered. You don't need to
11 respond. The question is also argumentative.

12 Q. (BY MR. BABCOCK) You testified that the cost
13 for doing the extra work is included in the REA. Am I
14 correctly recalling your testimony?

15 A. Restate the question once more for me,
16 please.

17 Q. Does the REA include the costs of the work
18 that you are claiming to perform the extra work?

19 A. Yes.

20 Q. And those costs were developed by Jerry Culp,
21 your project analyst; is that correct?

22 A. Perhaps a better description would summarize
23 by Mr. Barry Culp of Project Analysts and others at
24 Projects Analysts.

25 Q. But they weren't developed by you?

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1 MR. TROUT: Object to the form.
2 Q. (BY MR. BABCOCK) You didn't develop the
3 costs that are claimed in the REA; correct?
4 MR. TROUT: Same objection.
5 THE WITNESS: I'm not sure what you mean when
6 you say developed. Did I participate? Yes. Is that
7 part of developing?
8 Q. (BY MR. BABCOCK) Is there a methodology that
9 was used in the Project Analysts' approach to come up
10 with the claimed costs?
11 MR. TROUT: Object to the form. Calls for
12 expert opinion. You can answer if you understand the
13 question.
14 Q. (BY MR. BABCOCK) Your counsel is right. It
15 does call for expert opinion because it's an expert you
16 have that's developed those costs, prepared those costs.
17 Correct?
18 MR. TROUT: I'm going to object to the form
19 of the question. I'm going to instruct the witness not
20 to answer.
21 Q. (BY MR. BABCOCK) Is the methodology that was
22 used by Project Analysts a methodology that you
23 developed?
24 MR. TROUT: Object to the form of the
25 question.

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1 THE WITNESS: My bid proposal is a bid
2 document, and it does stipulate on that that there would
3 be a mutually agreeable schedule.
4 Q. (BY MR. BABCOCK) Was such a schedule
5 developed?
6 A. Excuse me, I was still thinking about the
7 response to the previous question. I'm sorry I paused,
8 but it was only because I was searching my memory. And
9 sometimes we answer with the first thing that pops into
10 your head and when we're talking about events this far in
11 the past, sometimes quiet reflection does help me
12 remember.
13 So let's pick up from that point and please ask
14 your question.
15 Q. Was a mutually agreeable schedule developed
16 for the project?
17 A. I don't think I'm understanding your
18 question. Let's try again.
19 Q. I thought your prior testimony was that you
20 expected a mutually agreed schedule to be developed. I
21 thought that's what you said?
22 A. I believe what I said -- and I may be
23 mistaken -- but what I intended was that there would be
24 agreed upon a mutually agreeable schedule and there were
25 discussions with Clyde personnel on that schedule prior

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1 THE WITNESS: I'm stumbling when you ask me
2 to answer about expert methodology on that subject, in
3 that it goes beyond my experience and knowledge that I
4 have.
5 Q. (BY MR. BABCOCK) That's fine. He developed
6 that methodology. That's not your methodology. That's
7 Project Analysts' methodology?
8 MR. TROUT: Object to the form of the
9 question.
10 Q. (BY MR. BABCOCK) Is that --
11 A. I'm perhaps a little timid just because some
12 answers I have given seem to anger counsel, so I'm trying
13 to temper my answers and I'm pleasantly pleased when you
14 accept one.
15 Q. Do you recall how long you anticipated when
16 you bid the project that Build would be on the project?
17 A. At the time of bid, my recollection, although
18 I'm certain it's not 100 percent, my recollection is that
19 the work could be done in certainly less than a year.
20 And I felt like it would be some breaks in the work
21 performance.
22 Q. There are no documents that reflect from your
23 bid time any duration that you anticipated the job going
24 for Build, Inc.'s involvement; is that right?
25 MR. TROUT: Object to the form.

1 to bid.
2 I'm finished with that answer. From now on I
3 will so -- I will so designate to you and forgive me for
4 leaving you hanging on that one.
5 Q. You said there were discussions pre-bid about
6 having a mutually agreed upon schedule? Is that what you
7 are saying?
8 A. Yes, sir.
9 Q. Was there later a mutually agreed upon
10 schedule?
11 MR. TROUT: Object to form.
12 THE WITNESS: There's discussions prior to
13 bid. I think there's discussions after the bid that
14 reflect what Build was intending. I believe that we
15 started work with an agreed schedule or near an agreed
16 schedule. And I also do not believe, but I know that
17 that schedule was impacted by the defective pile design
18 and not in a good way. And I am finished with that
19 answer.
20 Q. (BY MR. BABCOCK) Were you ever asked for
21 additional compensation on other pile driving jobs?
22 A. I do have a memory of two instances.
23 Q. Tell me about each of those.
24 A. Without being able to recall the project
25 name, I can recall its location. It was a UDOT job. It

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1 work involved was, which is reflected in Build's request
2 for equitable adjustment.

3 Q. (BY MR. BABCOCK) And what did he say?

4 MR. TROUT: Object to the form. The
5 deposition transcript speaks for itself.

6 MR. BABCOCK: I asked him what his personal
7 knowledge was and he said he agreed with Mr. Albrecht.

8 MR. TROUT: And based on what he said in the
9 transcript and the transcript is in the record.

10 Q. (BY MR. BABCOCK) Did you have discussions
11 with anybody in your organization about trying to track
12 the costs of whatever you deem to be extra work?

13 MR. TROUT: Object to the form.

14 THE WITNESS: My recollection is that the
15 documents contained in the record of this case prepared
16 by UDOT and Mr. Albrecht, and there's many documents to
17 answer your question. And if you repeat the question,
18 I'll try to focus in closer if it would help.

19 MR. BABCOCK: Would you restate my question
20 or re-read my question.

21 (The record was read by the court reporter.)

22 THE WITNESS: Forgive me. I misinterpreted
23 your question. I did have discussions with counsel and I
24 did have discussion with those employees working on
25 Legacy. I did have discussions with IGES. I guess

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1 talk about tracking costs with?

2 A. All of those on Legacy Highway.

3 Q. Did you talk about using any particular
4 paperwork or form work to track extra costs?

5 A. We did create a form.

6 Q. Who created the form?

7 A. I created the form.

8 Q. Did you give it to your employees to track
9 extra costs?

10 A. I did.

11 Q. What's on the form? What are the blanks
12 there to fill in?

13 A. Those forms are in the record. It contains
14 more than a typical pile driving form in my estimation
15 and it was -- we used an 11 by 17 sheet that was -- the
16 process was going to add significant costs to the
17 project.

18 We had a meeting as we were arriving at the
19 conclusion that UDOT had committed to pay for the extra
20 work and I believe it's recorded in meeting minutes that
21 UDOT would keep the record just to, in my view, relieve
22 that added cost to the job of having multiple inspectors.

23 Q. So did your people fill out the forms and
24 track the extra costs?

25 A. They did to begin with up until, in my mind,

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1 that's outside of my organization. Forgive me for
2 reporting that.

3 Q. (BY MR. BABCOCK) What discussions did you
4 have with the employees about trying to track costs of
5 this extra work? What was said?

6 A. At one point there was an agreement reached
7 with UDOT that they would keep detailed pile driving
8 records with their on-site inspectors and I accepted --
9 based upon memory, I accepted UDOT's commitment.

10 Q. My question to you had nothing to do with
11 that.

12 A. Forgive me, sir.

13 Q. My question was what was said in your
14 organization about tracking the costs. Your answer was
15 UDOT was going to track costs.

16 A. No, I don't think that was my answer.

17 Q. Okay.

18 A. I stated that I talked about it with my
19 employees and everyone on Legacy.

20 Q. So you talked to your employees and said, "We
21 need to track the costs"?

22 MR. TROUT: Object to the form of the
23 question.

24 THE WITNESS: Yes, sir.

25 Q. (BY MR. BABCOCK) Which employees did you

1 remembering back that far, UDOT committed to do it.

2 Q. What did they track? What is the information
3 they tracked?

4 A. I just respectfully ask we pull those forms
5 up out of the discovery documents and look at them for
6 that answer.

7 Q. You don't recall what you asked them to track
8 and what they tracked?

9 A. I do recall some items.

10 Q. What do you recall?

11 A. Okay. Thank you. It's just -- when there's
12 an actual document, I sometimes think that's going to
13 give us a better answer than my memory. But let's go off
14 of my memory.

15 It had the job name at the top. It had the
16 location of the pile.

17 Q. Tell me what their tracking to document extra
18 costs.

19 MR. TROUT: Would you please allow the
20 witness to answer the question without interruptions.

21 MR. BABCOCK: I'm trying to speed this up,
22 Counsel, and your objection slows us down.

23 MR. TROUT: Well, I prefer that you just be
24 civil with the witness and allow him to finish his
25 answer.

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1 took, how long it took?
2 A. How long it took, how many people were there,
3 what equipment was there, the location, and the list
4 shouldn't be limited to that. That's just what comes to
5 mind, sir.

6 Q. So we are talking about the cutting of
7 damaged pile. Then you said installation. What would
8 they track about in the installation of a pile?

9 A. All parts of it, all parts of the
10 installation of the piles, what the hammer energy was,
11 what the blows per foot were, all aspects of the
12 operation, sir.

13 Q. Did your company track the blows per foot?

14 A. Not typically. But towards the end of the
15 project, I did invest in a special device made by the
16 same manufacturer as the hammers were called an IHC
17 recorder, which would record blows but would not record
18 blows per foot. I'm trying to remember how it recorded
19 energy. I believe it did record energy too, the output
20 of the hammer. And we did use that equipment towards the
21 end of the job. We didn't have one for every pile
22 hammer. So it was a little bit sporadic but we did have
23 that equipment on site, sir.

24 Q. Did you make inquiry of UDOT about the status
25 of the tracking of the time being spent by your crews

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1 instructed not to answer.

2 Q. (BY MR. BABCOCK) So in driving a pile that
3 you believe is more difficult that's taking more time
4 than you had planned, what is the impact to your job
5 costs?

6 MR. TROUT: Object to the form.

7 THE WITNESS: Please restate the question.

8 Q. (BY MR. BABCOCK) If you are driving a pile
9 that's more difficult to drive than you anticipated, what
10 is the impact to your job costs?

11 MR. TROUT: I'm going to object to the form.
12 It's an improper hypothetical. It's an incomplete
13 hypothetical.

14 THE WITNESS: Well, my gut feel, to answer
15 your question, is if the pile is more difficult to drive
16 than I anticipated --

17 Q. (BY MR. BABCOCK) It takes longer to drive?

18 A. Particularly in this case because of pile
19 damage, inadequately sized piling material, then it does
20 affect my costs detrimentally.

21 Q. My question was how.

22 MR. TROUT: Same objection.

23 Q. (BY MR. BABCOCK) Does it cause your crew to
24 be there longer on the site driving that pile?

25 A. That's one aspect.

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1 doing various items of work?

2 A. We did request the records. We did receive
3 the records over time. As we got the records, I do
4 remember we had issues with the quality of the scan. I'm
5 trying to remember if they were faxed or scanned. And we
6 asked for a better copy.

7 I think what I'm stating here I'm stating from
8 memory, but it's likely recorded in documents too.

9 We did find after some period of time, months,
10 that the records were not perfect or as good as we had
11 thought they needed to be, should be. I don't think
12 they're even adequate for an accurate record of driving
13 the pile itself, let alone any other activities that were
14 going on.

15 Q. In driving the pile, if it's more difficult,
16 does it take longer to drive the pile?

17 MR. TROUT: Object to the form.

18 THE WITNESS: Can you clarify what you mean
19 by more difficult? More difficult --

20 Q. (BY MR. BABCOCK) I'm back to your question
21 of extra work that you claim you did.

22 Did you claim you did extra work in driving
23 piles?

24 MR. TROUT: I'm going to object to the
25 question. We have been over that. The witness is

1 Q. Does the crew size change or are they just
2 there longer driving it until they get it driven?

3 MR. TROUT: Object to the form. Improper
4 hypothetical.

5 THE WITNESS: It depends on the circumstance.

6 Q. (BY MR. BABCOCK) But you can track that. It
7 can take longer to drive it? I mean under what
8 circumstances do you have to change the size of the crew?

9 A. Well, the location would make a difference.
10 For instance, on Legacy, there was different areas of
11 work that Build was engaged in.

12 Say, for instance, that Build is unable to
13 advance a pile as a result of it not being strong enough
14 to drive, and we've got a crew there watching the pile
15 hammer run, and say there was another crew operating in
16 the same relative area, those crews, at least some part
17 of the personnel, might be redirected to go assist on
18 another crew, if that answers your question. Does it?

19 Q. We'll leave it to the experts.

20 Is Build asserting a claim for damages for
21 business devastation against Clyde-Geneva and UDOT in
22 this proceeding?

23 MR. TROUT: Objection. Asked and answered.
24 I instruct you not to answer.

25 Q. (BY MR. BABCOCK) What amount of damages is

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1 Build seeking for business devastation against
2 Clyde-Geneva and UDOT in this proceeding?

3 MR. TROUT: Object to the form of the
4 question. It's been asked and answered. The witness is
5 instructed not to answer.

6 Q. (BY MR. BABCOCK) Do you like your attorney?
7 Strike that. See if I get the same objection, Kim.

8 Is Build making a claim that it's entitled to a
9 portion of the incentive bonus that Clyde-Geneva received
10 from UDOT on the project?

11 MR. TROUT: I object to the form of the
12 question.

13 THE WITNESS: As we have -- as I have
14 mentioned -- I shouldn't say we -- Clyde-Geneva directed,
15 along with UDOT, to accomplish the work and the work was
16 accomplished.

17 Build expended its resources accomplishing the
18 extra work and Clyde-Geneva or UDOT paid. And how or
19 where that payment should have come from, I leave that to
20 others to decide.

21 MR. FITTS: I'm sorry, I didn't hear the end
22 of the answer.

23 THE WITNESS: I said I leave that to others
24 to decide.

25 Q. (BY MR. BABCOCK) So is Build asking for a

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1 A. Thank you for pointing that out. I just was
2 noticing the rain outside the window and welcome its
3 addition to our afternoon.

4 In regards to the question, I don't have any
5 understanding or conclusion in my own mind that would
6 cause me to indicate that I have any knowledge on -- as
7 to whether, how Clyde and UDOT could treat Build
8 equitably in making payment to Build, restitution to
9 Build.

10 Q. The restitution you are seeking is the amount
11 that's claimed in the REA; is that correct?

12 MR. TROUT: Object to the form.

13 THE WITNESS: The REA contains those costs
14 associated with the defective design, the defective pile
15 design. Build's additional claim is for the devastation
16 of its business.

17 Q. (BY MR. BABCOCK) Do you have a
18 quantification for that claim?

19 MR. TROUT: Same objections as before, Fred.
20 You are instructed not to answer.

21 Q. (BY MR. BABCOCK) So other than the amount of
22 the REA and the business devastation claim that you won't
23 tell me what amounts, those are the two major damages
24 that Build is seeking in this litigation; is that
25 correct?

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1 specific dollar amount of the incentive bonus that
2 Clyde-Geneva should be obligated to pay them?

3 MR. TROUT: Object to the form of the
4 question.

5 THE WITNESS: It's clear to me that
6 Clyde-Geneva and UDOT directed Build to accomplish extra
7 work. Build followed those directions and accomplished
8 that extra work.

9 However, away from what source Clyde-Geneva and
10 UDOT equitably compensate Build for the extra work is not
11 up to me to decide. That's my view.

12 Q. So you are not testifying that you are
13 entitled to so many dollars of the incentive bonus?

14 MR. TROUT: I'm going to object to the form
15 of the question and instruct the witness not to answer.
16 It's an improper rephraseology of the witness's answer
17 which should be allowed to stand.

18 You don't have to answer that, Freddie.

19 Q. (BY MR. BABCOCK) Is there any provision in
20 the subcontract that you rely on in support of your claim
21 that you are entitled to some incentive bonus?

22 MR. TROUT: Object to the form of the
23 question. Calls for a legal conclusion.

24 Q. (BY MR. BABCOCK) He didn't instruct you not
25 to answer that one, so you can answer it, if you want.

1 MR. TROUT: Object to the form of the
2 question.

3 THE WITNESS: I'm going to go a step beyond
4 it, those two items you just mentioned, and state for the
5 record that the piles, as installed, it is my
6 understanding and belief that those piles do not meet
7 applicable building codes. And I have no information
8 that gives me any comfort level that the State of Utah
9 has addressed that issue. And I seek that comfort level.

10 Q. (BY MR. BABCOCK) Are you seeking monetary
11 damages against Clyde-Geneva or UDOT because you don't
12 have a comfort level about whether or not those piles are
13 satisfactory?

14 A. The comfort level I seek is not in the form
15 of monetary damages, sir, for that issue specifically.

16 Q. What relief are you seeking in that regard?

17 A. A comfort level that the State of Utah has
18 adequately addressed that issue.

19 Q. In what form would you expect to see that
20 information?

21 A. I am not specifying a form. I would hope
22 that the State of Utah would arrive at a method that
23 would give me a comfort level for my review and for the
24 citizens of this great state's review.

25 Q. You don't have any documents, I understand,

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1 from your bidding worksheets that would reflect what
2 margin you bid anticipating to earn on this project; is
3 that correct?

4 MR. TROUT: Object to the form.

5 Q. (BY MR. BABCOCK) I can't go back and look at
6 a document, a worksheet that says, "We anticipated a 10
7 percent, a 12 and a half percent, a 15 percent, what
8 margin that as you bid the job you anticipated that
9 Build, Inc. was going to earn on the project?"

10 MR. TROUT: Same objection.

11 THE WITNESS: My bid proposal is a document
12 that obviously demonstrates I reviewed the contract
13 documents prior to bid. That document does not contain
14 the information you look for.

15 I did not have such a document at the time I
16 prepared the bid. I considered many parts of the project
17 preparing the bid, but I did not prepare that document
18 based upon my experience.

19 Q. (BY MR. BABCOCK) So there are no worksheets
20 that we can look at that would tell us what productivity
21 rates you anticipated, what driving rates you
22 anticipated, ratio of labor force, equipment time ratios
23 to labor? None of those kind of details exist; is that
24 correct?

25 MR. TROUT: Object to the form.

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1 and precisely what that margin is for different periods
2 of time as we sit here today, I do not.

3 Q. (BY MR. BABCOCK) What is your best
4 recollection of the -- excuse me, strike that.

5 What is your best recollection of what kind of
6 range of margin that Build would earn on an annual basis?

7 MR. TROUT: Same objection.

8 THE WITNESS: Well, from an overall
9 perspective, all business lines is one margin.
10 Individually piles, water tanks would all have a
11 different margin. And each margin for each of those
12 would be different at different time periods, depending
13 on all sorts of factors.

14 So for me to be able to have some number in
15 memory, which I don't have, I think it's unfair to ask
16 such a question.

17 Q. (BY MR. BABCOCK) Have you done that
18 analysis?

19 A. No.

20 Q. Have you seen it done?

21 A. For what period of time?

22 Q. Any period of time for Build.

23 A. I think Build's certified public accountants
24 created such document. Such documentation?

25 Q. Yes.

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1 THE WITNESS: That's correct. As we sit here
2 today, no document exists that answers that questions you
3 ask.

4 Q. (BY MR. BABCOCK) What is the historical
5 margin that Build earns on its work over the years?

6 MR. TROUT: Object to the form.

7 THE WITNESS: If you seek to apply a
8 historical perspective to the Legacy piles or perhaps
9 some other large pile job -- the historical perspective,
10 in my view, based upon my experience, is not applicable
11 just because of the quantity of piles and the unique
12 position Build was in for that job.

13 Q. (BY MR. BABCOCK) Okay. So what you are
14 saying is I asked what the historical margins were and
15 you said this job is different than the historical jobs.
16 But you didn't answer my question of if you look in the
17 records of Build, Inc. over the years, what is the range
18 of margin -- what is an average margin on an annual basis
19 that build is earning on its work?

20 MR. TROUT: Object to the form.

21 THE WITNESS: Well, I think when I answered
22 your question before, I simply stated that if it's your
23 intent to apply Build's historical margins, I don't think
24 it's applicable to Legacy.

25 But if you only want to know if I know exactly

1 A. In the form of some sort of report that they
2 would discuss and advise me with over different periods
3 of time.

4 Q. So as you sit here today, you can't tell me
5 what margin you anticipated earning on the Legacy project
6 when you submitted the bid to Clyde-Geneva and UDOT?

7 MR. TROUT: Objection. Asked and answered.
8 You don't need to answer that again, Freddie.

9 Q. (BY MR. BABCOCK) Was your subcontract with
10 Clyde-Geneva, overall contract with UDOT, a uniform
11 contract for this price driving pile work?

12 MR. TROUT: Object to the form. The document
13 speaks for itself.

14 THE WITNESS: I'm reviewing every item of
15 work in my mind and there are many items that work.

16 Q. (BY MR. BABCOCK) Is the pile driving work
17 based on unit prices?

18 MR. TROUT: Same objection.

19 THE WITNESS: By your definition of a unit
20 price, is lump sum item unit price?

21 Q. (BY MR. BABCOCK) No.

22 A. Then my answer is no.

23 Q. How were you paid for the driving of the
24 piles?

25 MR. TROUT: Same objection as to the form of

11

1 have to answer that. This is the fourth go around and
2 we're done. You are instructed not to answer that
3 question.

4 Q. (BY MR. BABCOCK) Did Kevin Nielsen want to
5 Build in operation when the board of directors decided to
6 shut down the business?

7 A. I truly believe that Mr. Nielsen more than
8 anything in this world wanted to keep Build in business
9 and succeed. At just -- if I can remember it, our catch
10 phrase from that period of time was survive to thrive.
11 It took me a minute. Sorry. That was Mr. Nielsen's
12 mantra. And he did his level best, I believe.

13 Q. What role did Jerry Culp play when you first
14 got him involved in the Legacy project?

15 A. Jerry Culp attended meetings, although I'm
16 not sure it was his specific role. I think all
17 participants in the project, Build, UDOT, Clyde-Geneva,
18 were trying to arrive at solutions to how to get these
19 piles installed without damaging them.

20 Q. Had Culp had expertise in pile driving?

21 A. I think you asked Mr. Culp what his expertise
22 and experience was. My memory and understanding is he
23 does have some history in drilling and foundation type
24 work but I'm only reporting that to you as a shadow in my
25 memory.

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1 but there was no specific direction to train everybody.
2 It was just more of, "What are you seeing that we are
3 faced with here and how are we going to deal with it?"
4 type of exchanges between Jerry, myself, and the crews.

5 Q. Did you ask him to begin documenting things
6 on behalf of Build to support its position in the
7 dispute?

8 A. What period of time are you speaking?

9 Q. When he got involved.

10 A. Not when he got involved. I don't -- well,
11 it's a long time ago. But I think when I first talked to
12 Jerry, as I indicated I had a problem and, "Come to this
13 meeting with me and tell me what you think." And for
14 lack of a better term, he offered me a fresh perspective
15 on what I'm seeing because, from where I'm sitting, quite
16 frankly, I think I used the term, and forgive me for it,
17 "I'm getting the shit kicked out of me."

18 Q. So you asked him to come to a meeting because
19 things aren't going well. In terms of tasks you gave
20 him, that's what I'm trying to get a handle on is what
21 did you ask him to do? Come to meetings?

22 A. Yes.

23 Q. Did you ask him to document things? Again,
24 I'm just trying to -- what is it you were asking him to
25 do.

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1 Q. But did you rely on him for expertise in pile
2 driving?

3 A. In my view, he's a knowledgeable man. But as
4 to whether I relied specifically on something he said or
5 indicated, I can't recall as we sit here today, sir.

6 Q. Again, I'm just trying to get a better handle
7 on what it was his assignment was.

8 I don't know that you engaged him so that he
9 could be a resource to you on how to drive these piles.
10 That's not why you in engaged him, is it?

11 A. I believe it was in part, sir.

12 Q. So you thought he had expertise in pile
13 driving that could help you figure out how to better
14 drive the piles?

15 A. If I was to say what I thought I would
16 suppose that I thought he offered a fresh perspective as
17 a knowledgeable, experienced man with a lot of years
18 experience in construction when the difficulties were
19 encountered installing the piles.

20 Q. Did you ask him to schedule the work?

21 A. In the early days, no.

22 Q. Did you ask him to train the field crews in
23 doing anything?

24 A. I know when we had meetings and site visits.
25 Sometimes Jerry was with me when we did talk with crews.

1 MR. TROUT: I'm going to object. It's been
2 asked and answered. The witness has been very compliant.

3 Q. (BY MR. BABCOCK) So only the things you have
4 testified to is what you have asked him to do; right?

5 A. Well, I'm going off of memory, sir.

6 Q. Okay.

7 A. So if you have a document that indicates
8 otherwise, I'll try and refresh my memory with it. But
9 as we sit here today, in August of 2014 and you are
10 asking me about events in early 2007. And I look into my
11 mind about a specific set of directions, was there an
12 engagement letter? I don't think so. Did he come help
13 me on an hourly basis? I think so.

14 I don't think there was a specific set of
15 directions I issued. I think -- I really think that my
16 -- if you will accept the term fresh perspective from a
17 knowledgeable man, I think that's the best way I can
18 describe the situation.

19 Q. He was not engaged to help you track the
20 actual costs being incurred by Build in the performance
21 of the work?

22 A. At what point in time?

23 Q. At any point in time.

24 A. Eventually that did become the case. The
25 specific time it happened was months into the job, but I

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1 Pile damage is not allowed under any circumstance. I'm
2 finished.
3 Q. Despite your feeling at the time that it
4 seemed impossible through the efforts that were expended,
5 it actually got accomplished?
6 MR. TROUT: Object to the form of the
7 question and instruct you not to answer that one more
8 time, if that's a question.
9 Q. (BY MR. BABCOCK) Is it your understanding
10 that the REA is a summary of the actual costs incurred by
11 Build in performing extra work or changed condition work?
12 MR. TROUT: Object to the form. You are
13 instructed not to answer. That's the fourth time that
14 question has been asked.
15 THE WITNESS: May I just run to the wash room
16 while you --
17 MR. BABCOCK: Yes.
18 (6-minute recess.)
19 MR. BABCOCK: That's all the questions I have
20 for Mr. Stromness. At this time we reserve the right to
21 continue this deposition after considering all the
22 instructions not to answer and the objections that have
23 been posed and how to deal with those. But at this time
24 that's far enough. I have it leave some time for Stan
25 here.

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1 asked any questions by UDOF or Clyde-Geneva with respect
2 to this document.
3 MR. FITTS: Or any of the attachments that
4 are exhibits?
5 MR. TROUT: No.
6 MR. FITTS: I appreciate that record and we
7 have exchanged correspondence and we are in disagreement
8 on this issue. And we feel that it will be appropriate,
9 given the prior deposition testimony and what we perceive
10 to be inconsistencies in this document and that testimony
11 that it would be appropriate to ask questions.
12 But it's my understanding that you are
13 instructing Mr. Stromness not to answer any questions
14 about this document. Is that --
15 MR. TROUT: That's correct.
16 MR. FITTS: So with that, in light of that
17 agreement to disagree, we'll address that in an
18 appropriate fashion.
19 MR. TROUT: Understood.
20 MR. BABCOCK: Anything else?
21 MR. TROUT: Read and sign.
22 (The deposition was concluded at 4:57 p.m.)
23 -oo0oo-
24
25

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1 (Exhibit No. 282 was marked for identification.)
2 EXAMINATION
3 (BY MR. FITTS)
4 Q. Freddie, as you know, my name is Stan Fitts,
5 and I have marked an exhibit that I'd like to ask some
6 questions about. It's Exhibit 282. Do you have that in
7 front of you?
8 A. I do.
9 Q. And do you recognize this as an exhibit, as a
10 Declaration of Freddie Stromness dated January 31st,
11 2014?
12 A. I do. I have not reviewed it.
13 Q. Why don't you take a minute and review it.
14 MR. TROUT: Just for the record, as indicated
15 to counsel prior to the deposition, we have concluded
16 that an examination of Mr. Stromness with respect to this
17 declaration long after the deposition by UDOF had been
18 completed was not part of our agreement with Clyde-Geneva
19 for the continuation of the deposition of Mr. Stromness.
20 And we advised counsel of that in advance of today by
21 correspondence. I believe Mr. Fitts and I have agreed to
22 disagree on this issue.
23 MR. FITTS: We are agreeing to disagree.
24 MR. TROUT: I understand you need to make a
25 record, but we are not going to allow Mr. Stromness to be

1 C E R T I F I C A T E
2
3 I, JILL C. DUNFORD, Registered
4 Professional Reporter, certify:
5 That the foregoing deposition of FREDDIE
6 N. STROMNESS was taken before me pursuant to Notice at
7 the time and place therein set forth, at which time the
8 witness was put under oath by me;
9 That the testimony of the witness and
10 all objections made at the time of the examination were
11 recorded stenographically by me and were thereafter
12 transcribed under my direction;
13 I FURTHER CERTIFY that I am neither
14 counsel for nor related to any party to said action nor
15 in any way interested in the outcome thereof.
16 Certified and dated this ____ day
17 of ____, 2014.
18
19
20 JILL C. DUNFORD, CSR, RPR, RMR
21 Certified Shorthand Reporter
22 for the State of Utah
23
24
25

Exhibit C

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

-o0o-
BUILD INC., a Utah) Deposition of:
corporation,)
) FRED N. STROMNESS
Plaintiff,) VOLUME 2
)
vs.)
)
UTAH DEPARTMENT OF)
TRANSPORTATION, an)
agency of the State of)
Utah; CLYDE-GENEVA)
CONSTRUCTORS A JOINT)
VENTURE, a Utah joint)
venture; W.W. CLYDE &)
CO., a Utah corporation;)
and GENEVA ROCK)
PRODUCTS, INC., a Utah)
corporation,) Civil No. 090904101
)
Defendants.) Judge Kennedy
)

-o0o-
July 31, 2013 - 9:00 a.m.

STRONG & HANNI
3 Triad Center, Suite 500
Salt Lake City, Utah

Jennifer L. Nazer
Registered Professional Reporter
Certified Shorthand Reporter

Jennifer L. Nazer RPR, CSR
Reporters Inc.

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Also Present: SHANE ALBRECHT
RICHARD STROMNESS

-o0o-

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I N D E X

The Witness: FRED STROMNESS - VOLUME 2

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MR. FITTS 208

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1 clay over the burning dump.
 2 A. Again, I think that's speculation.
 3 Q. Speculation?
 4 A. Yeah.
 5 Q. Well, if Build's forces were
 6 actually renting a dozer to spread clay material
 7 at the dump, that's something that Paul Adams
 8 would know about, isn't it?
 9 MR. TROUT: Object to the form.
 10 THE WITNESS: I don't know what Paul
 11 Adams knew or didn't know.
 12 Q. If that were actually occurring, is
 13 Build's business set up so that somebody at
 14 Build would actually know whether that was
 15 happening or not?
 16 A. In my mind, what took place on the
 17 Arcadia project was not fully understood at that
 18 point in time.
 19 Q. Just to be clear, so we can perhaps
 20 bring this line of questions to an end, you
 21 don't have any idea what the source of this
 22 information was as to renting a dozer to spread
 23 the clay; is that right?
 24 A. Well, my recollection is we had a
 25 dozer on-site.

Jennifer L. Nazer RPR, CSR
 Reporters Inc.

1 Q. At the county dump?
 2 A. At the project, that would have been
 3 available. So I don't think there would have
 4 been a need to rent one. You know, these are
 5 all the things that give me question about this
 6 and the speculative nature. Now, I do know that
 7 we did -- from the resolution meetings we had
 8 with LaVon and Rex, I do know that clay was
 9 hauled to the dairy.
 10 Q. Do you know who owned that dairy?
 11 A. I do not.
 12 Q. Is that about all you can say about
 13 D1?
 14 A. Yes.
 15 Q. Just one other question. Do you
 16 know if anyone at Build ever resolved whether or
 17 not a dozer was rented to spread the clay at the
 18 dump?
 19 A. I have no knowledge of that. It
 20 might be the case. I don't know. It might be
 21 the case that a dozer was on another -- our
 22 dozer was on another project. I don't have
 23 information on that.
 24 Could, at this juncture, we take a
 25 break?

Jennifer L. Nazer RPR, CSR
 Reporters Inc.

1 Q. Sure.
 2 A. I would be able to concentrate
 3 better.
 4 MR. TROUT: Should we take our lunch
 5 break now?
 6 MR. FITTS: Yes, let's do that.
 7 (Whereupon a lunch break was taken
 8 from 12:05 p.m. to 1:00 p.m.)
 9 Q. While you have that, 88 is change
 10 order number three on the I-215 project,
 11 correct?
 12 A. That is correct.
 13 Q. Let's do this. Let's mark this one
 14 100.
 15 (Deposition Exhibit 100 was marked
 16 for identification.)
 17 Q. I'll give that to you. That's
 18 change order number two on the --
 19 A. Okay, thank you, Stan.
 20 Q. -- I-215. We can take --
 21 A. Let's go back and take a look at --
 22 before I look at Exhibit 100, I want to make
 23 sure it's clear my testimony of earlier today.
 24 Q. About change order three?
 25 A. No. About a series of questions you

Jennifer L. Nazer RPR, CSR
 Reporters Inc.

1 asked me regarding Build's damage claim in
 2 specific regards to Legacy.
 3 Q. Okay.
 4 A. At one point I felt your inquiry was
 5 directed specifically about the pile driving,
 6 and I didn't want that to be misunderstood when
 7 I said --
 8 Q. Is that when I asked you about are
 9 there any other claims other than Jerry Culp's
 10 report?
 11 A. That's right.
 12 Q. I was going to follow up with you,
 13 out of fairness. In addition to Jerry Culp's
 14 report, you have a business devastation claim as
 15 well.
 16 A. That's correct.
 17 Q. Other than that, are there any other
 18 damage claims?
 19 A. Not that I can think of.
 20 Q. And the business devastation claim,
 21 is that based upon Joan Whittaker's report?
 22 A. It is.
 23 Q. Okay. Great. Thank you for that.
 24 A. I'll take a look at change order
 25 two. Thank you for producing that for my

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Exhibit D

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

-o0o-
BUILD INC., a Utah)
corporation,) Deposition of:
)
Plaintiff,) JOAN GAYLE WHITACRE
)
vs.)
)
UTAH DEPARTMENT OF)
TRANSPORTATION, an)
agency of the State of)
Utah; CLYDE-GENEVA)
CONSTRUCTORS A JOINT)
VENTURE, a Utah joint)
venture; W.W. CLYDE &)
CO., a Utah corporation;)
and GENEVA ROCK)
PRODUCTS, INC., a Utah)
corporation,) Civil No. 090904101
)
Defendants.) Judge Kennedy
)

-o0o-
August 20, 2013, 9:00 a.m.

STRONG & HANNI
3 Triad Center, Suite 500
Salt Lake City, Utah

Jennifer L. Nazer
Registered Professional Reporter
Certified Shorthand Reporter

Jennifer L. Nazer RPR, CSR
Reporters Inc.

I N D E X

The Witness: JOAN GAYLE WHITACRE

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Jennifer L. Nazer RPR, CSR
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RICHARD STROMNESS
R. BRAD TOWNSEND

-o0o-

Jennifer L. Nazer RPR, CSR
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1 litigation as well.

2 Q. Do you recall who the client was in
3 which you provided the expert testimony?

4 A. I knew you were going to ask that.
5 A contractor in McCall, Idaho.

6 Q. What kind of contractor? What's the
7 scope of work that contractor was doing?

8 A. That was a residential project. I
9 don't know the entire scope of their business,
10 but that one was a residential construction
11 project.

12 Q. What was the nature of your expert
13 testimony in that matter?

14 A. If I recall -- again, it was very,
15 very brief and very limited -- but I believe it
16 had to do with the appropriate amount being
17 charged for certain services provided under the
18 contract, and in that case it was actually snow
19 removal.

20 Q. So you weren't serving in the
21 capacity of testifying about accounting
22 evaluation or those kinds of issues. This was
23 more using your experience in the construction
24 industry as to the value of the snow removal
25 work?

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1 A. The fair and reasonableness of the
2 snow removal charges.

3 Q. And you've not testified before in
4 the capacity upon which you've relied upon or
5 used your license as a CPA?

6 A. No. May I add one correction? I've
7 been deposed one other time.

8 Q. When was that?

9 A. I had a client that sued a
10 contractor for falsification of documents, and I
11 was brought in to provide a deposition related
12 to that. I never -- I don't know if they solved
13 it or resolved it. I never ended up in court,
14 but I was deposed. I totally forgot about that
15 one.

16 Q. As a factual witness as opposed to
17 an expert?

18 A. I'm trying to remember why I would
19 have been there, other than I observed the
20 contractor on-site. I apologize. I don't
21 remember at this point why I was involved with
22 it. But I was briefly deposed.

23 Q. You've never been involved in
24 valuing a business for purposes of -- strike
25 that.

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1 You've never been involved as an
2 expert in valuing a business?

3 A. I would have performed services as
4 an employee of Touche Ross supporting partners
5 or other managers in providing valuation
6 services. The activities at that level were
7 fairly lower level type activities. It was
8 certainly not my name on the report or the
9 opinions that went with that report. And that
10 would have been a very long time ago.

11 Q. You haven't testified about the
12 valuation of a business?

13 A. No, I have not.

14 Q. You've never provided any expert
15 testimony about the valuation of a business?

16 A. No, I have not.

17 Q. And I think you testified today,
18 you're not expressing any expert opinion in this
19 matter about the valuation of Build?

20 A. No, I am not.

21 Q. And you're not testifying about or
22 expressing any expert opinion about the
23 valuation of Build over any period of time
24 either?

25 A. I am not.

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1 Q. And you're not -- you've never been
2 asked to testify about any claim for business
3 devastation?

4 A. I have not.

5 Q. You're not expressing any expert
6 opinion about any business devastation claim?

7 A. I am not.

8 Q. You were asked a question on your
9 report about the quantification of stresses that
10 you referenced before. Do you recall that? Do
11 you recall in your report you talked about
12 quantification of stresses?

13 A. I have said in my report I
14 believe -- unless you want me to refer to it --
15 is that the effect of -- the specific effect of
16 multiple stressors are not identifiable.

17 Q. Is what?

18 A. Not identifiable. Would you like me
19 to refer to my report?

20 Q. Yes.

21 A. I used the term stressor multiple
22 times. I just need to find where they are.

23 Q. I don't know if you're talking about
24 the middle of 11, the last paragraph, when you
25 say it's impossible to separate the synergistic

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Exhibit E

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

-o0o-

BUILD INC., a Utah)
corporation,) Deposition of:
)
Plaintiff,) KEVIN MARK NILSEN
)
vs.)
)
UTAH DEPARTMENT OF)
TRANSPORTATION, an)
agency of the State of)
Utah; CLYDE-GENEVA)
CONSTRUCTORS A JOINT)
VENTURE, a Utah joint)
venture; W.W. CLYDE &)
CO., a Utah corporation;)
and GENEVA ROCK)
PRODUCTS, INC., a Utah)
corporation,) Civil No. 090904101
)
Defendants.) Judge Kennedy
)

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August 23, 2013 - 9:00 a.m.

STRONG & HANNI
3 Triad Center, Suite 500
Salt Lake City, Utah

Jennifer L. Nazer
Registered Professional Reporter
Certified Shorthand Reporter

Jennifer L. Nazer RPR, CSR
Reporters Inc.

I N D E X

The Witness: KEVIN MARK NILSEN

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- 1 A. Two prior years.
- 2 Q. Okay. Do you recall as you reviewed
- 3 those financial statements forming any thoughts
- 4 or opinions as to the financial condition of the
- 5 business based upon the review -- your review of
- 6 the records at that point in time?
- 7 A. It was struggling.
- 8 Q. In what ways was the company
- 9 struggling based upon your review of those
- 10 financials during those two weeks of April?
- 11 A. Cash flow.
- 12 Q. Any other struggles?
- 13 A. Certain line item expenditures were
- 14 excessively high.
- 15 Q. What line item expenditures
- 16 concerned you during that initial review in the
- 17 early part of April of 2010?
- 18 A. Legal fees.
- 19 Q. Anything else?
- 20 A. Accounting fees. They were lumped
- 21 together. Legal and accounting was lumped
- 22 together.
- 23 Q. Anything else?
- 24 A. Not that I recall that jumped out.
- 25 Q. We're now in April. You've got an

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- 1 agreement with Mr. Stromness to serve as the
- 2 president, CEO of Build, Inc. Did you formulate
- 3 a plan to try to help turn the company around?
- 4 A. Yes.
- 5 Q. And what was your plan at that point
- 6 in time in early April 2010?
- 7 A. We looked at the direction that we
- 8 were going, and it was my opinion that we needed
- 9 to get back to the basics of what made the
- 10 company as good as it was, and that was the
- 11 tanks -- water tanks, and the pile driving and
- 12 to gear up to move away from the bridge
- 13 building.
- 14 Q. Was there something that concerned
- 15 you about the bridge building aspect of Build's
- 16 business mix at that point in time?
- 17 A. Yes.
- 18 Q. What was it that concerned you?
- 19 A. The actual construction of the
- 20 bridges, not the pile work or foundation work
- 21 that was involved, but the actual construction
- 22 of the bridges themselves.
- 23 Q. Again, in early April as you
- 24 formulated your plan, was there anything else
- 25 that caused you concern about what you needed to

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- 1 do to turn this business around?
- 2 A. Cutting overhead.
- 3 Q. Why was overhead a concern?
- 4 A. It was excessive based on the income
- 5 flow.
- 6 Q. Were there particular areas of
- 7 overhead that caused you concern as you looked
- 8 at the records initially in early April 2010?
- 9 A. Yes.
- 10 Q. And what were those areas?
- 11 A. Obviously, with me coming on board,
- 12 that put an added burden on executive
- 13 supervision. And Fred and his mother Mary were
- 14 on payroll as president and vice president,
- 15 secretary treasurer, and we had to take a look.
- 16 The income flow at that time would not support
- 17 three executive salaries. We also looked at the
- 18 accounting, and we looked at every vendor that
- 19 we were dealing with as far as, you know,
- 20 continuing operations and had to take a look and
- 21 make cuts, made changes, put things out for bid.
- 22 Q. After you had that initial chance to
- 23 look at the books and records in early April
- 24 2010, did you have any concerns about the
- 25 continued viability of Build, Inc.?

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- 1 A. I'll answer that this way. Prior to
- 2 me accepting the position, I gave the Stromness
- 3 family three directions that I thought that they
- 4 could go. One was one that they had already
- 5 looked at, and that was changing the company to
- 6 an ESOP. And I didn't necessarily agree with
- 7 it, but it was an option. Number two was to
- 8 take the company, get it back to profitability
- 9 and then turn it back over to the Stromness
- 10 family. And number three was get it back to
- 11 profitability, sell the company and get out.
- 12 Q. Did you recommend one of those
- 13 three?
- 14 A. No. Not at that point in time.
- 15 Q. Were you able to turn the business
- 16 around?
- 17 A. Obviously not.
- 18 Q. And what do you attribute the demise
- 19 of Build, Inc. to?
- 20 A. How long do you have?
- 21 Q. Until her fingers wear out.
- 22 A. There were a lot of circumstances.
- 23 Q. Let's do this. Are there major
- 24 reasons and minor reasons?
- 25 A. Absolutely.

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1 was a -- it was either a 3 or \$4
2 million line with Wells Fargo.
3 (Deposition Exhibit 252 was marked
4 for identification.)

5 Q. Let me hand you, Kevin, what has
6 been marked as 252 to your deposition. Can you
7 identify what that is?

8 A. It's a corporate org chart.

9 Q. And would this have been the
10 corporate organization for Build, Inc. at the
11 time of your hiring in April of 2010?

12 A. Yes.

13 Q. Now, I note that there's a box for
14 consultants. Were there any consultants that
15 were hired at or about the time you took over as
16 president and CEO of the business? By
17 consultants I mean outside consultants.

18 A. Well, I need to back up. This was
19 actually after -- this was made after I came to
20 be there. And it would probably be -- this
21 would be more along the line of June, late May
22 or June of 2010.

23 Q. All right. In what way did the
24 corporate organization differ when you started
25 in April from what we see in this exhibit?

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1 A. Jensen Kennington Jeremy Mortensen,
2 the comptroller, was not the accounting firm.

3 Q. Who was the accounting firm when you
4 started in April of --

5 A. Vanwagenen & Associates.

6 Q. Is there a reason why that was
7 changed?

8 A. Yes.

9 Q. What was the reason?

10 A. We felt that they were extremely
11 overpriced for what they were doing, and we also
12 felt that the information that we were receiving
13 was not being provided in a timely manner.

14 Q. So a switch was made.

15 A. A switch was made.

16 Q. Any other differences that would
17 have existed between a corporate organization as
18 of the time you started in April 2010 and what
19 we see in this exhibit?

20 A. Yeah. Alan Maples was not the shop
21 foreman at the time. It was...

22 Q. Someone else?

23 A. Peggy. I can't remember Peggy's
24 last name.

25 Q. That's fine.

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1 A. I can't remember her last name. She
2 was the shop foreman, and she was let go in the
3 end of June or July. So this is actually closer
4 to August, then.

5 Q. All right. So we'll call it late
6 summer 2010 organization chart?

7 A. Yeah.

8 Q. During the first few months, up to
9 the point in time this organization was in
10 place, up to and including, were you limited in
11 your role as president and CEO of the business
12 in any way?

13 A. Only from the fact that I identified
14 some people that I wanted to get rid of
15 immediately, and because of a loyalty issue, I
16 was requested by Fred, chairman of the board, to
17 work with them to try and bring them to where
18 they needed to be.

19 Q. Otherwise, all financial decisions,
20 were you given the ability to make those
21 day-to-day financial decisions?

22 A. Yes.

23 Q. As you started out in April of 2010,
24 did you have a list or have in mind a priority
25 list of things that you wanted to accomplish?

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1 A. Of course.

2 Q. What was at the top of that list?

3 A. Review all personnel, all vendors,
4 all facets of the company for viability.

5 Q. Did you have an impression that such
6 a review had not been done?

7 A. Had no impression one way or the
8 other. It's the way I work.

9 Q. Just take a fresh look at things?

10 A. Absolutely.

11 Q. All right. What else was at the top
12 of your list?

13 A. Downsizing overhead, getting lean
14 and mean.

15 Q. And when you say downsize overhead,
16 what particular issues, hot buttons were there
17 that you were most concerned about?

18 A. Payroll, labor, executive
19 supervision again, accounting and legal issues.

20 Q. What was it about payroll that
21 caused you concern?

22 A. I felt that there were some people
23 who were a little overpaid for what they were
24 doing.

25 Q. And was that limited to field

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1 A. You would have to ask the board
2 members.
3 Q. Okay. Were you in the board
4 meetings?
5 A. You asked me what was the discussion
6 amongst the board members.
7 Q. In the board meetings.
8 A. Okay.
9 Q. With the board members.
10 A. Yes.
11 Q. And what was the essence of the
12 discussions that were being held?
13 A. That we agreed that we cannot
14 continue doing any DOT work, bridge building
15 specifically -- we referred to it as DOT. It
16 just wasn't profitable.
17 Q. And then under Personnel -- well,
18 strike that.
19 Before we get to that point, it says
20 the tanks treatment plants piles and shoring
21 only, and the last line says -- or the last
22 sentence says, quote, it was initially agreed
23 that there would be the need to possibly double
24 shift most of the projects to free up bonding
25 capacity for future work, close quote.

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1 A. Uh-huh (affirmative).
2 Q. Had double shifting been done up to
3 that point?
4 A. No. Not on the piles.
5 Q. Was double shifting ever done during
6 the time that you were president and CEO?
7 A. Yes.
8 Q. Okay. On pile projects?
9 A. No.
10 Q. What types of projects was the
11 double shifting done?
12 A. DOT work or the bridge work.
13 Q. And under Personnel, there's a
14 discussion concerning Cameron.
15 A. Uh-huh (affirmative).
16 Q. What were the issues surrounding
17 Cameron's job performance at that point in time?
18 A. The projects were not being managed
19 properly. My recommendation was to terminate
20 him since we were not going to pursue any more
21 DOT work. No need to have a project manager if
22 he doesn't have anything to do. The
23 conversation had taken place previously. Fred
24 had requested that I continued to work with him
25 to try and get him to understand where we were

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1 headed and what we needed to do. Those efforts
2 obviously failed. He elected to leave. He was
3 offered the position to move back into the
4 field. Based on his understanding, he said, I
5 can make these profitable. Great. Then you
6 need to move back into the field and take over
7 the projects, not as a PM but as the general
8 superintendent to finish these up. Prove me
9 wrong. Please prove me wrong. And that's when
10 he elected to leave the company.
11 Q. It then goes on to state, quote --
12 this is page 3, top of page 3 -- he does not
13 want to provide RMN and Jeremy the necessary
14 financial costs and income information needed to
15 accurately assess the bid proposals. And we are
16 not able to financially track the projects he is
17 responsible for, close quote.
18 Was that a problem with other
19 personnel in the company other than just
20 Cameron?
21 A. No.
22 Q. So you didn't experience that type
23 of problem with anyone other than Cameron?
24 A. The bookkeeper Tina, it eventually
25 came after we hounded and hounded and hounded.

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1 We would eventually get the information we
2 needed. But it took a long time. Cameron just
3 absolutely did not understand WIPs at all.
4 Q. Okay. What project was Cameron on
5 at that point in time?
6 A. He was in charge of the WYDOT
7 projects, 27 bridges that we were refurbishing
8 in Wyoming, and the Menan Lorenzo bridge project
9 in Idaho and had just bid and won, without my
10 knowledge, the ITD project in Idaho.
11 Q. So you weren't aware that the
12 company was going to bid on it?
13 A. No.
14 Q. Who prepared the bid?
15 A. He did.
16 Q. And won the job?
17 A. Yeah. At close to a half million
18 dollar loss.
19 Q. What was the reason for having lost
20 a half a million on that job?
21 A. He doesn't know allocation. He's
22 not a project manager. He doesn't know his
23 costs, and he doesn't know labor allocation.
24 Q. And when was that particular
25 project? When was that carried out?

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1 A. The WYDOT project had started right
2 before I got there. We were stuck with it.
3 Q. But the later project in Idaho, when
4 did that start?
5 A. That started in, I think, November
6 of 2011. We got started, then got shut down for
7 the winter, had to pick it up the following
8 year. And then we ended up finishing it in
9 September, October.
10 Q. What was the name of that project?
11 A. ITD. It's -- if you gave me a job
12 list, I could give you the exact name.
13 Q. So eventually the ITD project was
14 completed by Build but at a half million dollar
15 loss?
16 A. Pretty close to half million.
17 Q. All right. Idaho Transportation
18 Department, district wide bridge preservation?
19 A. Yes.
20 Q. Then there's a reference to -- later
21 on in the first bullet point on page LE072371,
22 it reads, quote, Cameron's understanding of the
23 accounting problems came about as a result of
24 KMN having to insist that an invoice be created,
25 paren, on Menan, M-E-N-A-N, close paren, for the

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1 FWLOC. What is that?
2 A. Far West.
3 Q. Far West. Okay. Borrowing base
4 cert?
5 A. Correct.
6 Q. Cameron protested and said he didn't
7 know how much we were going to get paid, so how
8 could he produce an invoice? He finally said he
9 understood the need for a bogus or fake invoice
10 and then produced an invoice for 139K, close
11 quote. Did I read that right?
12 A. Correct.
13 Q. What was going on there?
14 A. We had to purchase sealant for the
15 bridges. We had to purchase them in order to
16 get them there on time, and then the job got
17 shut down for winter anyway. They would only
18 pay for materials stored on-site. The company
19 wouldn't generate an invoice for us. IT --
20 Q. Company selling the product?
21 A. Correct. Because of the way the
22 allocation and line items are done on DOT work,
23 because you can lump a whole bunch of things
24 into a single line item, okay? So it's hard to
25 break out exactly what's involved in that.

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1 Q. Okay. And then it continues on,
2 just skipping down to the last sentence in that
3 same bullet point. Quote, there has to be
4 accurate accounting for the work competed, costs
5 incurred and expenses authorized, and this is
6 the primary responsibility of the project
7 managers, close quote.
8 Did you experience other incidents
9 where there was not accurate accounting for work
10 being completed and costs incurred other than
11 this one with Cameron?
12 A. Pretty much anything that Cameron
13 was involved in.
14 Q. Okay. But projects other than those
15 that Cameron had been involved in?
16 A. No. They totally understood the
17 WIPs and how they worked.
18 Q. As of the conclusion of the meeting
19 on January 27th of 2011, were any decisions made
20 with regard to Cameron remaining with the
21 company?
22 A. Uh-huh (affirmative).
23 Q. What decisions were made?
24 A. He was to be offered a position to
25 go back into the field as the superintendent,

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1 make sure the jobs finished up and prove
2 himself, and that was the offer that was going
3 to be made. His salary would remain the same.
4 He would be a superintendent, not a project
5 manager, wouldn't have an office. He would be
6 in the field.
7 Q. And he declined.
8 A. He effectively declined and walked
9 away from the company.
10 Q. Let me draw your attention now to
11 page LE072372, the bottom paragraph. This
12 appears under the paragraph 2. It looks like
13 it's an alternative discussion to the
14 downsizing. The option would be potentially
15 shutting the business down. And then the
16 paragraph -- the bullet point continues to the
17 top of the following page, and it says, quote, a
18 brief discussion about shutting the company down
19 took place, but it was not a viable solution at
20 this time, close quote.
21 I take it from your testimony that
22 that was never your desire to shut the company
23 down.
24 A. It was never my desire. It was
25 always an option.

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- 1 A. Nope.
- 2 (Deposition Exhibit 275 was marked
- 3 for identification.)
- 4 Q. I'll hand you what's been marked as
- 5 Exhibit 275. Have you seen that document
- 6 before?
- 7 A. Yes.
- 8 Q. Is this when essentially CNA Surety
- 9 pulled the plug on any additional surety?
- 10 A. Correct.
- 11 Q. And the date of the document is June
- 12 24th, 2011?
- 13 A. Yes.
- 14 Q. What was done in response to receipt
- 15 of the notice from CNA that they would no longer
- 16 serve as your surety?
- 17 A. We continued to try and find
- 18 additional bonding companies.
- 19 Q. And were you ever successful in
- 20 finding others?
- 21 A. We did. We found a couple that
- 22 dealt with us on a one or two project.
- 23 Q. Do you remember which projects those
- 24 were?
- 25 A. One of them was the firehouse down

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- 1 in Lehi for bid bond.
- 2 Q. Who was the surety that issued that
- 3 bond?
- 4 A. I'm trying to remember and I can't.
- 5 I apologize. GCNA.
- 6 Q. GCNA?
- 7 A. GCNA. Or GANC or something like
- 8 that. It's Great American something.
- 9 Q. GCNA.
- 10 A. GCNA. And that was through
- 11 Stirling.
- 12 (Deposition Exhibit 276 was marked
- 13 for identification.)
- 14 Q. Now I've handed you what we've
- 15 marked as Exhibit 276. And could you identify
- 16 what that document is?
- 17 A. It's an e-mail from myself to
- 18 Stirling Broadhead regarding the second quarter
- 19 statement on projections.
- 20 Q. Is Mr. Broadhead at this point in
- 21 time trying to search for a surety home for
- 22 Build?
- 23 A. Yup.
- 24 Q. And what was the purpose of sending
- 25 him this particular document?

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- 1 A. He had requested the second quarter
- 2 statements on income projections so that he
- 3 could further pursue additional people.
- 4 Q. In that e-mail you tell him that
- 5 we've had some problems, but we've made some
- 6 personnel changes and feel like with having made
- 7 those changes, we can turn the company around.
- 8 A. Yes.
- 9 Q. How much was lost on the Wyoming DOT
- 10 project approximately?
- 11 A. A million four.
- 12 Q. And what did you attribute that loss
- 13 to? What was the cause of that loss?
- 14 A. It was underbid by a half million
- 15 dollars, and overtime expenses rather than
- 16 double shifting and just mismanagement, total
- 17 mismanagement.
- 18 Q. Were there other jobs in 2011 where
- 19 you sustained what you considered to be
- 20 significant losses?
- 21 A. Yes.
- 22 Q. What other projects were there?
- 23 A. The Menan bridge --
- 24 Q. Menan?
- 25 A. Lorenzo bridge, and that's also the

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- 1 ITD is when we got that one. We knew that was
- 2 at best a break-even.
- 3 Q. Did it prove to be a break-even?
- 4 A. Oh, no.
- 5 Q. Do you remember what the loss was
- 6 there?
- 7 A. 200, 250,000.
- 8 Q. Any other projects where the company
- 9 sustained significant losses?
- 10 A. No. Not that I'm aware of.
- 11 Q. The Menan job, how much was lost
- 12 there?
- 13 A. If I'm not mistaken -- here again,
- 14 numbers are just flying around here -- I think
- 15 it was \$600,000.
- 16 Q. Okay. In 2010, did the company lose
- 17 money on any projects?
- 18 A. Yeah.
- 19 Q. What projects did it lose what you
- 20 would consider a significant amount of money?
- 21 A. Well, they were ongoing projects.
- 22 Okay? WYDOT, which was the Wyoming DOT project,
- 23 started in 2010. That was a continual loser
- 24 from day one.
- 25 Q. Okay. That was the one that was

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1 misbid?
 2 A. Underbid and mismanaged.
 3 Q. Underbid, mismanaged and should have
 4 had --
 5 A. Double shifts, yes.
 6 Q. Okay. What other projects in 2010,
 7 after you got there, whether they had been bid
 8 previously, started previously, came and
 9 finished in 2010, that resulted in losses?
 10 A. Very, very few of them finished in
 11 2010. So the losses were carrying over into
 12 2011, 2012. That's the problem. When you have
 13 the seasonal work for the DOT, you don't finish
 14 it in one year. So it carries over.
 15 Q. So the good news, your bid is
 16 delayed a year.
 17 A. Yes.
 18 Q. All right. I think we're going to
 19 solve the GCNA mystery at this point, the proper
 20 acronym.
 21 (Deposition Exhibit 277 was marked
 22 for identification.)
 23 Q. I'll hand you Exhibit 277. Okay.
 24 Can you tell us what Exhibit 277 is?
 25 A. Yeah. It's an e-mail from myself to

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1 Phil Walter regarding the proposal that we --
 2 after a meeting that we had from GCNA.
 3 Q. Did GCNA subsequently issue bid
 4 bonds?
 5 A. Yes.
 6 Q. To Build?
 7 A. Yes.
 8 Q. Do you recall how many?
 9 A. I'm sure of one. That was the Lehi
 10 job. Lehi firehouse.
 11 Q. Do you remember what the value of
 12 that bid was?
 13 A. No. I'm sorry. I don't. It was
 14 not a large project.
 15 Q. So they offered you 1.5 single job
 16 with a bond limit with a 4 million aggregate?
 17 A. Yes.
 18 Q. Do you think the Lehi fire job was
 19 more than, say, half a million?
 20 A. Oh, no. It was less than that. If
 21 I'm not mistaken, it was less than 100,000.
 22 Q. Okay. So there was still a
 23 significant portion of the aggregate bond limit
 24 still available through your relationship with
 25 GCNA.

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1 A. No. They offered this -- okay? --
 2 based on conditions.
 3 Q. And did you meet the conditions?
 4 A. No.
 5 Q. Which conditions did you not meet?
 6 A. We never got an equipment package
 7 put together with Cat.
 8 Q. So that's the second to the
 9 bottom --
 10 A. Second to the bottom. New line and
 11 credit was not in place.
 12 Q. Who is Cat?
 13 A. Caterpillar.
 14 Q. Okay.
 15 A. Caterpillar Equipment Financing.
 16 Q. All right. What was the other one I
 17 missed? I'm sorry.
 18 A. It is right above it. The new line
 19 of credit to replace the Far West line.
 20 Q. All right.
 21 A. And we never went down on the full
 22 indemnity issue. And then...
 23 Q. When you say you didn't go down, did
 24 you --
 25 A. Yeah. This is what they proposed.

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1 We took a look at it and said, you know, you're
 2 asking for things that I can't commit to. They
 3 wanted me to stay on for an additional two
 4 years, which I was willing to do it, but I would
 5 have to think real hard about it.
 6 Q. Okay. So there were a series of
 7 deal breakers in their proposal.
 8 A. Oh, yeah. I mean, some of the
 9 conditions here are just -- yeah. They're deal
 10 breakers.
 11 (Deposition Exhibit 278 was marked
 12 for identification.)
 13 Q. Let me hand you what's been marked
 14 as Exhibit 278. Could you identify what Exhibit
 15 278 is?
 16 A. It is a letter from myself recapping
 17 the shutdown status of Build.
 18 Q. So this was a letter you prepared --
 19 well, it says, Dear Fred. Was it --
 20 A. It was prepared for the board of
 21 directors.
 22 Q. Okay. You state in the first
 23 paragraph, in accordance with the board's
 24 direction I received on September 30, 2011, the
 25 plan for Build's shutdown -- and then it goes

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- 1 profitable year?
- 2 A. I don't recall.
- 3 Q. But at least you can testify that
- 4 2009, '10 and '11 were all unprofitable years.
- 5 A. Correct.
- 6 Q. Now, you've testified that at least
- 7 a major source of problem was over \$2 million of
- 8 losses on jobs that had been bid and managed by
- 9 Cameron Erickson.
- 10 A. Correct.
- 11 Q. That was -- those losses you've
- 12 talked about were incurred in -- largely in
- 13 2010, 2011?
- 14 A. Yes. Well, it's when the contract
- 15 was awarded, so they would be attributed to that
- 16 year. But we didn't see the sustained losses
- 17 until 2011, 2012.
- 18 Q. I think some of the frustration
- 19 there in viewing some of the exhibits is that
- 20 you don't believe that Cameron was being
- 21 forthright about what the progress was on the
- 22 job, if you will, percent complete versus the
- 23 expenses to date.
- 24 A. Correct.
- 25 Q. And by the time that all sorted out,

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- 1 it turned from what he was saying would be maybe
- 2 a break-even job to big losers.
- 3 A. Correct.
- 4 Q. Do you know if he was a project
- 5 manager on jobs in earlier years, 2007, 2008?
- 6 A. No, he was not.
- 7 Q. He was not?
- 8 A. He was not.
- 9 Q. Do you know when he first became a
- 10 project manager?
- 11 A. If I'm not mistaken, it was not long
- 12 before I got there, maybe six months. He took
- 13 over and was brought into the office to handle
- 14 the I-215, one out in Vernal.
- 15 Q. Arcadia?
- 16 A. Arcadia. To finish up that job.
- 17 And that's when he was brought in. He was
- 18 superintendent prior to that.
- 19 Q. All right. And when he was brought
- 20 in, he was given responsibilities for estimating
- 21 as well?
- 22 A. Yes.
- 23 Q. And was his principal focus in the
- 24 bridge work?
- 25 A. DOT work.

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- 1 Q. DOT -- DOT work?
- 2 A. Correct.
- 3 Q. Now, you mentioned that he was
- 4 brought in to finish the Arcadia project. Who
- 5 was running the Arcadia project before he got
- 6 involved?
- 7 A. As the project manager?
- 8 Q. Right.
- 9 A. Paul Adams.
- 10 Q. There were allegations, in fact,
- 11 charges brought against Paul Adams, were there
- 12 not, about taking money from the business?
- 13 A. Yes.
- 14 Q. What do you know about those
- 15 allegations?
- 16 A. I don't know anything about the
- 17 allegations other than general overview that
- 18 they caught him and he's responsible to make
- 19 recompense to the company and -- through the
- 20 courts. And he's a flight risk constantly.
- 21 Q. What kind of things did you learn or
- 22 were you told about what was happening -- what
- 23 he was doing to take money from the company?
- 24 A. The only thing that I'm aware of how
- 25 he was doing it is he actually had a blank check

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- 1 after he was let go or quit. And I'm not sure
- 2 how that relationship ended. And actually
- 3 forged some signatures on a check. The bank
- 4 actually honored it, believe it or not, and then
- 5 he also was getting kickbacks from some
- 6 suppliers.
- 7 Q. Do you know what kind of suppliers?
- 8 A. Equipment rental.
- 9 Q. Are you aware of any other
- 10 improprieties that were talked about within the
- 11 company about what he was doing out there on the
- 12 job in Vernal?
- 13 A. Not specifically, no.
- 14 Q. Do you have any other facts as to
- 15 whether or not he was properly managing the work
- 16 and doing the work in an efficient manner?
- 17 A. No.
- 18 Q. Do you know if the Arcadia job was a
- 19 profitable job for Build?
- 20 A. In the overall?
- 21 Q. Yes.
- 22 A. I don't.
- 23 Q. If you look at 278.
- 24 A. Okay.
- 25 Q. The second page under the heading

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1 January 15th, 2012 section, at the end of that
2 there's a paragraph, bold title. It's called
3 Financial Shortages.
4 A. Yes.
5 Q. It states, it's clearly anticipated
6 that with the final work being completed shortly
7 or remaining work that is shut down for the
8 winter, the project billing receivables will not
9 be able to sustain the job expenses as well as
10 the G&A expenses and the costs associated with
11 the eventual shutdown.

12 Do you agree with that statement?

13 A. I made it.

14 Q. Is it an indication that even on an
15 ongoing basis at this time that the income being
16 received was insufficient to cover job expenses
17 and G&A as well?

18 A. Yes. We were going to need a bridge
19 loan for 3 to \$400,000 because of the seasonal
20 work. When you shut down on a job, you still
21 have to pay -- your G&A expenses are there. You
22 still have salaries, and you don't like to
23 rehire, especially key people. Otherwise,
24 they're gone.

25 Q. But management made the decision, no

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1 more investing from the Stromness family,
2 correct?

3 A. Correct.

4 Q. And that would have to have been
5 obtained from some other source, and that wasn't
6 happening? A bridge loan was not in the works.

7 A. No.

8 Q. If you look back at Exhibit 277,
9 this is from Phil Walter. In the bullet points,
10 some of these conditions, you testified that
11 there were a number of deal breakers in the
12 deal?

13 A. Uh-huh (affirmative).

14 Q. Correct?

15 A. Yes.

16 Q. But one of the ones I wanted to get
17 your feedback on is it said, no more money
18 leaving Build to finance outside projects by the
19 family's entities.

20 Do you recall whether that would
21 have been a condition imposed by the Guaranty
22 Company of North America?

23 A. No. I can't answer for why they
24 would put that as a condition.

25 Q. Are you aware if, in fact, money had

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1 previously been taken out of Build to finance
2 outside projects from the family entities?

3 A. Yes.

4 Q. What can you tell me about that?

5 A. Stromnesses owned outside entities.
6 They owned Build. They owned the whole package.

7 Q. Okay.

8 A. They took money in a profitable
9 year, and how they took it, I'm not sure of how
10 it was done. But it was used to develop and
11 build post offices, the primary source of
12 income.

13 Q. Did you have any discussions with
14 the Stromness family about whether that could
15 continue while you were operating as the
16 president of Build?

17 A. Yes.

18 Q. And what did you tell them?

19 A. I said it can't. Build has to stand
20 on its own to find out if it is a viable
21 company, and if it is a viable company, it will
22 stand on its own.

23 Q. Other than the DOT jobs that Cameron
24 had been bidding and managing that were
25 unprofitable, do you recall the profitability of

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1 other jobs that were being undertaken by Build?

2 A. I do.

3 Q. Tell me what you recall about other
4 work.

5 A. Our tanks were either breaking even
6 or showing anywhere from a 3- to a 7-percent
7 profit. The pile work would show anywhere from
8 18- to 40-percent profit.

9 Q. When you talk about profit there, is
10 that after G&A expenses --

11 A. Yes.

12 Q. -- is that before the allocation of
13 G&A?

14 A. Yes.

15 Q. Those are different. You mentioned
16 some profit margins on water tank work jobs and
17 on the pile driving jobs --

18 A. Uh-huh (affirmative).

19 Q. -- were those percentages before the
20 G&A was allocated or after the G&A was allocated
21 and that would have been maybe a net profit as
22 opposed to gross profit?

23 A. It was net profit.

24 Q. It was net profit? Okay.

25 A. Uh-huh (affirmative).

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